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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912-1913

No. 912-415

ROBERT RUSSELL, PLAINTIFF IN ERROR,

vs.

CHARLES E. SEBASTIAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JANUARY 7, 1913.

(23,488)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 10, 1913.

a Criminal No. 1733.

In the Supreme Court of the State of California.

In the Matter of the Application of ROBERT RUSSELL for a Writ of Habeas Corpus.

Chickering & Gregory, Trippet, Chapman & Biby, Coulter Bldg., 213 S. Broadway, Los Angeles, Attorneys for Applicant.

Filed Mch. 6, 1912. B Grant Taylor, Clerk. By ——— ———, Deputy.

1-3 In the Supreme Court of the State of Arkansas.

In the Matter of the Application of ROBERT RUSSELL for a Writ of Habeas Corpus.

To the Supreme Court of the State of California, and to the Honorable Chief Justice and Justices Thereof:

The petition of Robert Russell respectfully shows:

That Robert Russell is unlawfully imprisoned, detained, held in actual custody and restrained of his liberty by Charles E. Sebastian, chief of police of the city of Los Angeles, in the county of Los Angeles, state of California.

That the said imprisonment, detention, holding in custody and restraint are illegal.

That said illegality consists in this, to wit:

I.

That the Economic Gas Company is now, and ever since
4 May 18, 1909, has been, a corporation created, organized and existing under and by virtue of the laws of the state of California.

II.

That at none of the times mentioned herein were there, nor are there now, any public works owned and controlled by the municipality of the city of Los Angeles, county of Los Angeles, state of California, for supplying the same with artificial light; that the said Economic Gas Company was and is duly incorporated for such purpose, to wit, the purpose of supplying the city of Los Angeles and its inhabitants with artificial light, to wit, gaslight, and is so incorporated under and by authority of the laws of the state of California.

III.

That said city of Los Angeles is now, and at all times herein mentioned has been, a body politic incorporate, to wit, a corporation organized and incorporated under a freeholder's charter ratified by

qualified voters of said city of Los Angeles at a special election held on the 31st day of May, 1888, and duly approved by the legislature of the state of California in January, 1889. That said charter so adopted and the amendments thereto constitute the organic law of said city, and the whole of such organic law.

IV.

That said charter as amended and in force at the times herein mentioned, provides, among other things, for a department of public works under the management of three commissioners who shall constitute the board of public works, and that said board of public works shall have charge, superintendency and control of all public ways, streets and highways in the said city of Los Angeles, and of the manner of their use and occupation and of all work and improvements done in, over, or under the same, and of all excavations made in or under the same. That said department of public works was created by an amendment of said charter in the year 1905, and since said time the said board of public works has had, and now has, the charge of said streets and constructions as aforesaid.

That said department of public works was created by article XIV of said charter. That section 146 of said article XIV provides:

"That the board of public works shall have charge, superintendence and control under such ordinances as may from time to time be adopted by the city council:

1. Of all public ways, streets, avenues, boulevards, lanes, alleys, places and courts, now open or which may hereafter be opened in the city of Los Angeles; of the manner of their use and occupation; of all work and improvements done in, on, over or under the same, and of all excavations made in or under the same." * * *

"6. Of all public utilities that are now, or may hereafter be owned, controlled or operated by the city other than water works and electric power and light works, and systems, and except wharves, piers, docks, warehouses, and other utilities of the city pertaining to the water front, harbors and other navigable waters within the city."

V.

That section 2, of article 1 of the said charter provides as follows:

"SEC. 2. The city of Los Angeles, in addition to any other powers now held by, or that may hereafter be granted to it under the constitution or laws of the state, shall have the right and power: * * *

"(30) To fix and determine the rates or compensation to be collected by any person, firm or corporation, for water, gas, electric current, refrigeration, heat, light, power, telephones, telephone service or connections, or the conveyance of passengers or freight, by means of street railway cars, hacks, cabs, or other cars or vehicles for hire, or for the products of, or service by, any other public utility

operated or conducted within the city limits; and to prescribe the character and quality of any public utility service.

"To regulate, subject to the provisions of the constitution of the state of California, the construction and operation of railroads, interurban railroads, street railways, or other means of transportation, conduits, waterworks, and works or plants for the production, transmission or distribution of gas, electricity, heat, refrigeration or power, and the works or plants of any other public service utility." * * *

"(40) Except as otherwise provided in this article, no franchise, right or privilege in, on, through, across, under or over any street, avenue, alley, bridge, viaduct, subway or other public place, and no other franchise whatever granted by the city to any cor-
7 poration, association or individual, shall be granted except by an ordinance passed by a vote of two-thirds of the whole council, nor for a longer period than twenty-one years, and such grant and any contract in pursuance thereof shall provide that at the option of the city, declared not more than three years, nor less than six months, before the termination of such grant, the plant and property, if any, belonging to or used by the grantee, or his or its successors in interest, in the streets, avenues and other public places shall, at the termination of said grant, upon the payment of a fair valuation thereof, be and become the property of the city; but the grantee shall be entitled to no payment because of any value derived from the franchise; provided, however, that such option shall not be exercised unless at the time of exercising the same the city shall be authorized and empowered to acquire and operate such plant and property. Every grant shall specify the mode of determining any valuation therein provided for and the time and mode of payment, and shall make adequate provision by way of forfeiture of the grant or otherwise, to secure efficiency of public service at reasonable rates, and the maintenance of the property in good order throughout the term of the grant.

"In all cases in which a franchise for a railroad, street railway or interurban railway, either surface, elevated or underground shall be granted for a line which would be an extension of or would connect directly with an existing line of railroad, street railway or interurban railway, such franchise shall in no case be granted for a longer period than the unexpired term of the franchise of the said existing line of which it will be an extension, or with which it will directly connect." * * *

"(46) To grant franchises or privileges in, on, through,
8 across, under or over any street, avenue, alley, bridge, viaduct, tunnel, subway or other public place, or upon the water front or in or upon navigable waters within the city; to prescribe the terms and conditions of any such grant, and to prescribe by ordinance the method of procedure for making such grants; subject, however, to the limitations elsewhere contained in this article."

VI.

That there are no other provisions in said charter, or the amendments thereof, of the city of Los Angeles attempting to give or grant

to the said city of Los Angeles, or the officers thereof any right, power or duty concerning the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein and connections therewith, by any company duly incorporated for the purpose of supplying said municipality and the inhabitants thereof with artificial light as aforesaid.

VII.

That in the year 1885 the state of California adopted an amendment to its constitution, which amendment is known as article XI, section 19, and is as follows, to wit:

"In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or
9 other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

VIII.

That the said Economic Gas Company, in June, 1909, accepted the right so granted by the constitution of the state of California, to use the public streets and thoroughfares of said city of Los Angeles, and to lay down pipes and conduits in said streets and thoroughfares and make connections therewith so far as might be necessary for introducing into and supplying said city of Los Angeles and the inhabitants thereof with gas-light, by incorporating as aforesaid, and for the purposes as aforesaid, and by acquiring in said city of Los Angeles, for a large and valuable consideration, works and conduits erected by its predecessor, under and in accordance with, and pursuant to said constitutional grant, in the city of Los Angeles, for the purposes of supplying the said city of Los Angeles and its inhabitants with artificial light, to wit, gaslight. That after the said Economic Gas Company acquired said property, so constructed in pursuance of and by au-
10 thority of said constitution as aforesaid, the said Economic Gas Company had extended, in said city, prior to October 10, 1911, the said system already constructed, and prior to October 10, 1911, the said Economic Gas Company had constructed and completed a large plant in said city for the purpose of manufacturing gaslight, and had laid many miles of main pipes and conduits in the public streets and thoroughfares of said city, to wit, more than twenty-nine miles of such mains, and had made con-

nections with buildings occupied by inhabitants of said city, to wit, with many users and consumers of gaslight so manufactured by said Economic Gas Company, from said mains and in said public streets and thoroughfares, and had made more than two thousand four hundred of such connections, and was supplying on October 10, 1911, more than three thousand five hundred consumers with such gas in said city.

IX.

That said Economic Gas Company designed and intended, at the time it acquired such system, and ever since has intended, to extend its said distributing system, and to supply the said city of Los Angeles and its inhabitants with gaslight in every section of said city, and to every inhabitant thereof, who desired to or would take gas from said Economic Gas Company, and said company has ever since its incorporation diligently prosecuted the work
11 of constructing its system with a view of completion.

X.

That the said construction of the said Economic Gas Company was made with a view of complying with said intention and design, and of supplying a very much larger territory and a great many more inhabitants of the city of Los Angeles than it was so supplying on October 10, 1911; that said plant is far more expensive and contains a very much greater capacity than is necessary to supply the said territory abutting or contiguous to streets in which its said street mains and conduits were laid on October 10, 1911, and was sufficient to so supply many more inhabitants of the city of Los Angeles than it was supplying upon said last named date. That by reason of the said construction being so originally made with a design and intention of supplying a much larger territory and many more inhabitants than it was supplying upon said October 10, 1911, the expense of constructing the same was far greater, to wit, more than $100,000.00 greater, than would have been necessary if the said system had been intended to be limited to the territory so served on said date, and to supplying the inhabitants then supplied on said date in said territory. That by reason of such increased expense in said construction, as aforesaid, the said Economic Gas Company cannot supply the terri-
12 tory contiguous to the streets occupied on said date and to the inhabitants of said territory at a profit; but to supply only the said limited territory and the inhabitants thereof with gaslight, would entail upon said company a constant loss, to wit, a loss of more than $2,000.00 per month. That in order that said Economic Gas Company supply the said city of Los Angeles and the inhabitants thereof with gaslight at a profit, it is necessary that the original design, intention, plan and purpose of said Economic Gas Company be carried out and carried forward, and that the said Economic Gas Company extend its said mains and occupy many more of the public streets and thoroughfares of said

city, so that it can supply a much greater number of the inhabitants of the said city of Los Angeles with gaslight, and if the said Economic Gas Company is not permitted to make said extensions, it will have to operate as aforesaid at a loss, or abandon its property, but if the said Economic Gas Company is permitted to make said extensions according to said design, plan and purpose, it can supply a greater number of the inhabitants of said city, and can do so at a cheaper rate than it is now supplying the inhabitants of said city within such limited territory and make a profit upon its investment. That said company cannot serve new customers without extending its street mains and conduits beyond the points to which they reached on October 10, 1911.

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XI.

That the said city of Los Angeles, on February 21, 1912, passed and adopted Ordinance No. 24110, a copy of which ordinance is attached hereto and made a part hereof and marked "Exhibit A." That said Economic Gas Company has complied with all the terms and conditions of said ordinance, except that said board of public works claims said company should purchase a franchise as provided in exhibit B, which said company has refused to do.

XII.

That on October 26, 1911, the said city of Los Angeles passed and adopted Ordinance No. 23624, a copy of which is hereto attached, hereof made a part and marked "Exhibit B."

XIII.

That in the year 1911 the state of California amended the said constitution of the state of California, which amendment went into effect October 10, 1911, said amendment being in the words and figures following, to wit:

"Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such service upon such con-

14 ditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

XIV.

That all of said conduits, pipe lines and connections were laid down in said public streets and thoroughfares with the knowledge and acquiescence of the city of Los Angeles and of said board of public works, and with the knowledge and acquiescence and consent of said board of public works, and under and in pursuance of such general regulations as the said city of Los Angeles had prescribed for damages and indemnity for damages. That pursuant to the requirements of the said city of Los Angeles, the said Economic Gas Company has deposited with said city a large sum of money, to-wit, $1500, as indemnity to said city to protect the said city against any and all damages which it might sustain by reason of any of the acts of said Economic Gas Company in connection with the said construction, and said deposit was made as required by the regulations of said city, and that said Economic Gas Company has complied with all regulations that the said city of Los Angeles has prescribed for damages and indemnity for damages, and is now willing and ready to comply with such other general regulations as the said city of Los Angeles may hereafter prescribe for damages and indemnity for damages.

XV.

That said Economic Gas Company had entered into contracts with many inhabitants of the city of Los Angeles, by which contracts the said Economic Gas Company had agreed to supply the said inhabitants with gaslight; that in order that said Economic Gas Company supply said inhabitants with gaslight, with whom it has made said contracts, it is necessary that the said Economic Gas Company largely extend its said street mains and occupy many more of said public streets and thoroughfares than the said Economic Gas Company now occupies, or occupied on October 10, 1911. That such contracts are still in full force and effect and cannot be carried out on the part of the Economic Gas Company unless said company extend its said mains as aforesaid; that otherwise said contracts would become wholly useless to the Economic Gas Company and a total loss, and the business of said Economic Gas Company in all portions of the city of Los Angeles, other than those portions served by it on said last named date, would be ruined.

XVI.

That occupants of buildings or premises who are inhabitants of said City of Los Angeles, distant not more than 100 feet from the gas mains of the said Economic Gas Company, have made application in writing to said Economic Gas Company to supply gas to the said buildings so occupied by said inhabitants, as required by said buildings or premises; that said Economic Gas Company cannot supply such inhabitants with gaslight without extending its said mains in the public streets and thoroughfares of said city; that said applicants do not owe the said Economic Gas Company anything,

and are willing to pay the said Economic Gas Company for such services; that said Economic Gas Company is liable for damages for refusal or neglect to continue its mains and supply such inhabitants with gas as provided by section 629 of the Civil Code of the state of California.

XVII.

That on the 23rd day of February, 1912, the said Economic Gas Company applied to the said board of public works for permission to enter upon Sunset boulevard between San Fernando street and New High street, a thoroughfare of and in the city of Los Angeles, and make excavations therein for the purposes of
17 laying down mains for gas pipe to extend its system to supply the inhabitants of said city in pursuance to the grant of said constitution and with the foregoing contracts and demands of inhabitants of said city, as aforesaid, and offered then and there to comply with such general regulations prescribed by said city of Los Angeles and all officials thereof, for damages and indemnity for damages, in the matter of opening said street and laying conduit therein for the purpose of laying pipe to extend the said system of the said Economic Gas Company, as aforesaid, and said board of public works informed the said Economic Gas Company that there were no general regulations of the said city on the subject that the said Economic Gas Company had not complied with, but that said board of public works would not permit the said Economic Gas Company to open said street or to lay pipe therein unless the said Economic Gas Company first applied for and obtained by purchase a franchise for the purpose of extending its said mains as provided by said ordinance, "Exhibit B," and the said Economic Gas Company then and there notified the said board of public works that the said Economic Gas Company would, in pursuance of its rights as granted by the constitution of the state of California, extend its said mains along said streets for the purposes of supplying said municipality and inhabitants.

18 XVIII.

That the said board of public works, on or about February 10, 1912, notified the said Economic Gas Company it would not allow the said Economic Gas Company to extend its said system over any portion of the public streets or thoroughfares of said city of Los Angeles unless the said Economic Gas Company first procured a franchise therefor in pursuance of the ordinance "Exhibit B," hereto attached, or to do any work or excavation in any of the streets of said city for that purpose. The said board of public works did then and there state to said Economic Gas Company that this refusal to so allow said Economic Gas Company to extend its said distributing system was based wholly upon the fact that upon October 10, 1911, the aforesaid amendment to section 19 of article 11 of the constitution of the state of California had been adopted and that the said board of public works were advised and believed that by virtue of said amendment the right of said Eco-

nomic Gas Company to use any portion of the public streets and thoroughfares of said city for the purpose of supplying said city and its inhabitants with illuminating light had been completely taken away and abrogated, save and except as to those portions of said streets and highways which had been actually occupied by such corporation for such purpose prior to the date of such amendment.

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XIX.

That notwithstanding said notice of said board of public works, and the refusal of said board of public works, as aforesaid, to permit the said Economic Gas Company to extend its said mains, the said Economic Gas Company notified the said board of public works that it would, on a certain day, to-wit, the 27th day of February, 1912, aforesaid, at 9:00 o'clock a. m., extend its said mains in said streets, to-wit: Sunset boulevard between San Fernando St. and New High St., and requested said board of public works to direct and superintend such work. That in pursuance of said notice and in pursuance of the facts herein aforesaid, and for no other purpose, the said Economic Gas Company did then proceed to open a public street of the city of Los Angeles for the sole purpose of putting down therein a conduit and gas pipe to extend its mains as aforesaid, and to supply inhabitants of the city of Los Angeles with whom it had made contracts therefor, as aforesaid, with gaslight, and the said applicant was engaged in the services of the said Economic Gas Company in so laying said gas pipe on the — day of February, 1912, and thereupon, and solely by reason of such work, the said board of public works caused the arrest of said applicant, and caused the said chief of police of the city of Los Angeles to arrest the said applicant and to imprison and hold him in custody and restrain
20 him as hereinbefore alleged, the said chief of police claiming and maintaining that the said applicant was then and there committing a misdemeanor by violating the terms and conditions of said ordinance by doing the said acts aforesaid, without first obtaining a franchise from said city so to do, and thereafter obtaining a permit in accordance with said franchise.

XX.

That by virtue of the aforesaid facts, the Economic Gas Company, prior to October 10, 1911, had accepted the right and grant conferred upon it by virtue of the said section 19 of article XI of the constitution of the state of California, as the same existed prior to October 10, 1911, and that to now prevent the Economic Gas Company from extending its said lighting system so constructed prior to said last named date, will impair the obligation of the contract existing prior to said date with the people of the state of California, and it is therefore contrary to the provisions of section 10 of article XI of the constitution of the United States, which prohibits any state from passing a law impairing the obligation of a contract.

XXI.

That by such acts on the part of the city of Los Angeles and by the amendment to the constitution of the state of California, as aforesaid, the Economic Gas Company will be deprived of its property without due process of law as guaranteed to it by the fourteenth amendment to the constitution of the United States.

XXII.

That by such acts on the part of the people of the state of California and the city of Los Angeles, the said Economic Gas Company will be denied the equal protection of the laws as guaranteed to it by the said fourteenth amendment to the constitution of the United States.

XXIII.

That no prior application has been made for a writ in regard to the said detention or restraint complained of in this application.

XXIV.

The circumstances which in the opinion of the applicant render it proper that the writ hereinafter prayed for should issue originally from this court, are as follows:

Section 19, article XI of the constitution of the state of California, as it existed prior to its amendment on October 10, 1911, had been construed by this court as a grant of right to persons and domestic corporations to occupy the streets of municipalities within the state of California so far as might be necessary for the purpose of laying down conduits therein and connections therewith for the purpose of supplying any municipality and the inhabitatns thereof with gas light or artificial light, subject only to such general regulations as might be imposed by the municipalities in respect of damages and indemnity for damages, and subject to the direction of the superintendent of streets or other officer in control of the streets within a municipality. At a special election held in California on the 10th day of October, 1911, the aforesaid section 19 of article XI of the constitution as the same had been construed by this court, was amended. The city attorney of the city of Los Angeles, the city attorney of the city of San Francisco, and city attorneys of other cities within the state of California, have advised the governing bodies of such cities and the officers thereof having control of the streets, that the grant in this petition referred to contained in section 19, article XI of the constitution, as it existed prior to October 10, 1911, had been completely abrogated and taken away, save and except as to those portions of streets and highways which had been actually occupied for the purposes specified in said constitutional grant prior to October 10, 1911, and that no extensions can be made of such ligthing systems within the streets of a city unless and until a franchise therefor shall have been granted by such city to the person or corporation desiring to make such extension. That said Economic Gas Company is required by section

629 of the Civil Code of the state of California, to extend its
23 gas system in the city of Los Angeles and supply persons applying for gas therewith within certain limits. That the city of Los Angeles and the officers thereof having charge of the public streets declined to permit said Economic Gas Company to extend its system to comply with its contracts and with its obligations under the law of California. That a multiplicity of suits may be commenced against the Economic Gas Company and other public utility corporations, and said companies may be liable for great and increasing damages, by not complying with section 629 of the Civil Code. That said Economic Gas Company claims a right to make such extensions under the constitution of the state of California and the constitution of the United States, and your petitioner is advised by counsel and alleges: That by reason of the great public importance of the questions involved in this petition, and the fact that questions arising involve the construction of an amendment of the constitution of the state of California, it is advisable that the matter be determined originally by this court.

Wherefore, your petitioner prays that a writ of habeas corpus may be granted, directed to the said chief of police of said city of Los Angeles, commanding him to have the body of the applicant before Your Honors at a time and place therein to be specified, to do and receive what shall then and there be considered by
24 Your Honors concerning him; together with the time and cause of his detention and said writ, and that said applicant may be restored to his liberty.

CHICKERING & GREGORY,
TRIPPET, CHAPMAN & BIBY,
Attorneys for Applicant.

EXHIBIT A.

Ordinance No. 24410.

(New Series.)

An Ordinance Regulating the Making and Refilling of Excavations in Public Streets, Alleys, Sidewalks, and Other Public Places.

The mayor and council of the city of Los Angeles do ordain as follows:

SECTION 1. It shall be unlawful for any person, firm or corporation to make, or to cause or permit to be made, any excavation in or under the surface of any public street, alley, sidewalk or other public place for the installation, repair or removal of any pipe, conduit, duct or tunnel, or for any other purpose, without first obtaining from the board of public works a written permit to make such excavation and making a deposit to cover the cost of inspection and of restoring such public street, alley, sidewalk or other public place to its original condition, together with the incidental expenses in connection therewith, all as hereinafter in this ordinance

provided. The board of public works, before issuing such permit, shall require:

First, a written application therefor, to be made and filed with said board, wherein the applicant shall set forth the name and residence or business address of the person, firm or corporation making such application, and shall state in detail the location and area of each excavation intended to be made, and shall state the purpose for which the excavation is to be made and used;

Second, the presentation of a plat in duplicate showing the location of each proposed excavation and the dimensions thereof, and such other details as the board of public works may require to be shown upon such plat; provided, that the filing of plats shall not be required when excavations are made for service connections for the location of trouble in conduits or pipes or for making repairs thereto; and

Third, that the applicant show legal authority to occupy and use, for the purpose mentioned in said application, the streets, alleys, sidewalks or other public places wherein the excavation is proposed to be made.

The board of public works shall adopt such regulations for the location, size and depth of such excavations as it may deem necessary for the public welfare.

SEC. 2. It shall be unlawful for any person, firm or corporation to make, or to cause or permit to be made, any excavation, or to install or maintain, or to cause or permit to be installed or maintained, any tank, pipe, conduit, duct or tunnel in or under the surface of any public street, alley, sidewalk or other public place at any location, other than that described in the application and shown on the plats filed by such person, firm or corporation, as required by the provisions of this ordinance.

SEC. 3. When the application to excavate and the details shown upon the accompanying duplicate plats, when such plats are required, comply with the terms of this ordinance and the regulations of the board of public works, the application and duplicate plats shall be approved by the city engineer. After such approval, one of the duplicate plats shall be filed in the office of the city engineer as a public record. The application and the other duplicate plat shall be filed with the board of public works, together with special deposits as follows, to-wit: a sum equal to thirty (30) cents per square foot of surface of each such excavation to be made in streets or other public places which have been macadamized or paved; a sum equal to twenty (20) cents for each square foot of surface of each such excavation to be made in streets or other public places which have been graveled; and a sum equal to ten (10) cents for each square foot of surface of each such excavation to be made in streets or other public places which are neither macadamized, paved nor graveled; provided, that no deposit shall be less than five ($5) dollars; and provided further, that any person, firm or corporation intending to make excavations in public streets, alleys or other public places may make and maintain with the said board of public works a general deposit in the sum of fifteen hundred

($1500) dollars, which general deposit shall be used for the same purpose as the special deposits described hereinbefore in this section, and while such general deposit is maintained at the said sum of fifteen hundred ($1500) dollars, such person, firm or corporation shall not be required to make the special deposits hereinbefore in this section provided for, but shall be required to file a written application for a permit for each such excavation and duplicate plats showing the location thereof, as in this ordinance provided, and to comply with all of the other provisions of this ordinance; provided further, that the deposit to be made for a permit to excavate for the purpose of making house connections to sewers or for making reparis to the same shall be made as hereinafter in this section required.

When an application is made for a permit to excavate for
27 the purpose of making a house connection with a sewer or for repairs to the same, the person, firm or corporation making such application shall make a special deposit with the board of public works of the sum of twelve ($12) dollars if such excavation is to be made in a paved or macadamized street, and the sum of eight ($8) dollars if such excavation is to be made in a street that has not been paved or macadamized; provided, however, that any person, firm or corporation may make and maintain with the said board of public works a general deposit of one hundred ($100) dollars, which general deposit shall be used for the same purpose as the special deposits for house connections referred to in this section, and while such general deposit is maintained at the said sum of one hundred ($100) dollars, such person, firm or corporation shall not be required to make the special deposits for such purpose as in this section provided for, but shall be required to file a written application for a permit for each such excavation, as in this ordinance provided, and shall also be required to make a deposit to cover the cost of inspection as follows:

If the excavation is to be made in a paved or macadamized street, alley or other public place, $1.25;

If the excavation is to be made in a street, alley or other public place that has not been paved or macadamized, 50 cents.

Such person, firm or corporation shall also be required to comply with all of the other provisions of this ordinance.

SEC. 4. Upon receiving a written application, as provided in section 1 of this ordinance, and one of the duplicate plats, when such plats are required, each bearing the approval of the city engineer, and the general or special deposit required by section 3 hereof, the
28 board of public works shall issue a written permit to make such excavation and shall open and keep an account thereof; provided, however, that the board of public works shall not issue such permit unless the applicant has legal authority to occupy and use, for the purpose mentioned in the application, the streets, alleys, sidewalks or other public places covered by said application.

Such permit shall state whether the work to be done is covered by a general or a special deposit and, if a special deposit, shall state the amount thereof and shall be a receipt therefor. It shall also

specify the person, firm or corporation to whom the same is issued, the street, alley or other public place and the particular portion or portions thereof to be excavated and the extent of such excavation. No permit shall be transferable. Every such permit, except for making house connections to sewers or for making repairs to the same, shall become and be void unless the excavation to be made pursuant thereto is commenced within sixty (60) days from the date of issuance of such permit and the work diligently prosecuted as in this ordinance required. Every permit for making a house connection to a sewer or for making repairs to the same shall become and be void unless all work to be done pursuant thereto shall be done and the excavation refilled in the manner required by this ordinance, within thirty (30) days after the date of such permit; provided, however, that the board of public works may grant an extension of time for a period not exceeding thirty (30) days for the performance of such work and the refilling of such excavation whenever the board of public works shall deem that good cause exists therefor, and provided further, that if any such extension of time be granted, such permit shall become and be void unless all such work shall be done and such excavation refilled in the manner required
29 by this ordinance, prior to the expiration of such extension of time; and provided further, that any excavation made for the purpose of making a house connection to a sewer shall be refilled, in the manner required by this ordinance, within five (5) days after inspection of the pipe by the board of public works, if a pipe be laid, or within five (5) days after the date of the permit if no pipe be laid and nothing herein contained shall be deemed or construed to allow a longer period of time therefor.

If any person, firm or corporation shall fail, refuse or neglect to complete the making of any house connection to a sewer or to refill any excavation within the time required by this section, or within the period of any such extension of time, if any such extension be granted, then the board of public works shall complete the refilling of such excavation in the manner required by this ordinance and the city of Los Angeles shall retain the cost of such refilling from the special deposit made for such excavation, if a special deposit shall have been made, or, in case a general deposit of one hundred ($100) dollars is maintained as provided in section 3 of this ordinance, the said city shall retain such amount from such general deposit.

If work is not commenced pursuant to any such permit within thirty (30) days in the case of an excavation for a house connection to a sewer, or within sixty (60) days in the case of any other excavation, after the date of such permit, such permit shall be cancelled and the city shall retain the following amounts from any general or special deposit of the person, firm or corporation to whom such permit was issued: $1.25 if such permit was issued for an excavation in a paved or macadamized street, alley or other public place, and 50 cents if such permit was issued for an excavation in a street, alley or other public place that has not
30 been paved or macadamized; provided, that if the person, firm or corporation to whom such permit was issued is main-

taining a general deposit of one hundred ($100) dollars for house sewer connections, as provided in section 3 of this ordinance, and has paid for such permit the amount required by the said section 3, then no deduction shall be made from such general deposit if work is not commenced within the time required by this section.

SEC. 5. All excavations shall be refilled in the following manner, to-wit: In streets which have not been graveled, macadamized or paved, and where water is available, and where, in the opinion of the board of public works, the material excavated can be properly settled by the use of water, the trench may be filled to within not less than one foot from the surface, and shall then be thoroughly flooded and the material settled by *p*olling or with shovels. If so directed by the board of public works, the filling shall be settled at not more than two intermediate depths to be determined by the said board, before it is brought to within one foot of the surface. After the material has been allowed to settle, the trench shall be filled to the surface, again flooded and again allowed to settle. It shall then be filled to the surface of the street, oiled if the street has been oiled, and all longitudinal trenches shall be thoroughly rolled with a roller weighing not less than six tons. If the street or place where such excavation is made has been graveled or macadamized, the gravel or macadam removed therefrom shall be kept separate from all other material. If the excavated material is such as can be settled by water, the trench shall be refilled in the manner hereinbefore provided, up to the under side of such gravel or macadam; the gravel or macadam shall be replaced on the surface of the filled trench and thoroughly tamped, rolled and
31 oiled to correspond with the undisturbed portion of the street, and all longitudinal trenches shall then be rolled with a roller weighing not less than six tons. If the street or other public place in which such excavation is made has been paved and the material can be settled as above specified, the excavation shall be refilled, as hereinbefore provided, up to the under side of the pavement, and when such refilling is in proper condition, the pavement torn up or damaged by such excavation shall be replaced in accordance with the specifications then in use by the city of Los Angeles for the laying of pavement of the character of that which has been removed. In all cases where a pipe not exceeding four (4) inches in diameter is placed in an excavation, all the material removed therefrom shall be replaced therein. If the excavation has been made in a street or other public place where water is not available, or where, in the opinion of the board of public works the material excavated cannot be properly settled by the use of water, the trench shall be filled in layers of not more than six inches each in depth, each layer to be well rammed with rammers weighing not less than one pound per square inch of face. If required by the board of public works, one man shall be furnished to tamp for each man engaged in filling the trench. Surplus material not required in refilling trenches shall be promptly removed by the person, firm or corporation to whom the permit was granted. All excavations shall be refilled and the surfaces thereof restored to their original con-

dition without delay in the best and most workmanlike manner with the same kind of material as that removed in making the excavation, so that the condition of each excavated street shall be the same in every respect as that existing before such excavation was made.

SEC. 6. It shall be the duty of every person, firm or cor-
32 poration making any excavation in any public street, alley or other public place, to maintain safe crossings for vehicle traffic at all street intersections, and safe crossings for pedestrians at intervals of not more than three hundred (300) feet. If any such excavation is made across any public street or alley, at least one safe crossing shall be maintained at all times for vehicles and pedestrians. Free access must be provided to all fire hydrants and water gates. All materials excavated shall be laid compactly along the side of the trench and kept trimmed up so as to cause as little inconvenience as possible to public travel. If the street is not wide enough to hold the excavated materials without using part of the adjacent sidewalk, the person, firm or corporation by whom the excavation is made shall erect a tight board fence upon and along such sidewalk and keep a passageway at least six (6) feet in width open upon and along such sidewalk. All gutters shall be maintained free and unobstructed for the full depth of the adjacent curb and for at least one (1) foot in width from the face of such curb at the gutter line. Wherever a gutter crosses an intersecting street an adequate waterway shall be provided and at all times maintained.

It shall be the duty of every person, firm of corporation making any excavation in any public street, alley or other public place, to place and maintain barriers at each end of such excavation and at such places as my be necessary along the excavation to prevent accident, and also to place and maintain lights at each end of such excavation and at distances of not more than fifty (50) feet along the line thereof, from sunset each day to sunrise of the next day, until such excavation is entirely refilled; and it shall be unlawful for any person, firm or corporation to fail, refuse or neglect to comply with any requirement contained in this section.

33 SEC. 7. After such excavation is commenced, the work of making and refilling the same shall be prosecuted with due diligence and so as not to obstruct the street or other public place or travel thereon, more than is actually necessary therefor. If the work is not so prosecuted or if the work of refilling does not, in the judgment of the board of public works, comply with the terms of this ordinance, the board of public works shall notify the person, firm or corporation named in the permit that the work is not being prosecuted with due diligence or that the refilling of such excavation has not been properly done, and shall require such person, firm or corporation, within five days after the service of such notice, to proceed with the diligent prosecution of such work, or properly to complete the same, as the case may be. Such notice shall be written or printed, and shall be served personally or by leaving the same at the residence or place of business of such person, firm or corporation; or if such person, firm or corporation cannot

be found, and such place of business or residence is unknown, or is outside of the city of Los Angeles, such notice may be served by depositing the same in the post office in a sealed envelope, postage fully prepaid, addressed to such person, firm or corporation at such place of business or residence, if known, or, if unknown, at the city of Los Angeles. If such notice is not complied with the board of public works shall do such work as may be necessary to refill such excavation and to restore the street or other public place, or part thereof, excavated, to as good a condition as the same was in before such excavation was made.

SEC. 8. The person, firm or corporation by whom any excavation shall be made in any public street, alley or other public place, shall be deemed and held to guarantee the work of refilling and repair thereof for the period of one (1) year after the refilling of such excavation, against all defects in workmanship or materials. Whenever within such period of one year any part of the pavement or surface of any public street or place so guaranteed becomes in need of repairs by reason of any defect in workmanship or material used in such work of refilling or repair, the board of public works shall serve on the person, firm or corporation by whom the excavation was made, a written notice stating the repairs necessary and requiring such repairs to be made within five days after the service of such notice. Such notice shall be served in the manner provided in section 7 of this ordinance, and if the same is not complied with, the board of public works shall at once make such repairs.

SEC. 9. The said city shall deduct from the deposit made for any excavation under the provisions of this ordinance a sum equal to two and one-half (2½) cents for each square foot of surface of excavation made in any public street, alley or other public place that has been paved or macadamized, and one-fifth (1/5) of one cent for each square foot of surface of excavation made in any public street, alley or other public place that has not been paved or macadamized; provided, however, that such deduction shall not be less than 50 cents in the aggregate for excavations made in the same street, alley or other public place pursuant to one permit; and provided further, that the deduction to be made from a special deposit for a permit for a house sewer connection shall be as follows:

If the excavation was made in a paved or macadamized street, alley or other public place, $1.25; if in a graded or ungraded street, alley or other public place, 50 cents.

The balance of each such deposit, after the deductions hereinbefore provided for have been made, shall be retained by the city of Los Angeles for one (1) year from the date of the completion of the work.

The said city shall also deduct the cost of any work done or repairs made by the board of public works, as provided for in this ordinance, from any and all deposits then on hand, belonging to or that may thereafter be made by any person, firm or corporation required by this ordinance to do any work or to make any repairs under the provisions of sections 7 and 8 of this ordinance, and

who shall have failed, refused or neglected to perform such work or to make such repairs.

SEC. 10. Each special deposit made pursuant to the provisions of this ordinance shall be retained by the city of Los Angeles for a period of one year after the completion of the refilling of the excavation on account of which such special deposit was made, and at the expiration of such period of one year, such special deposit, less the deductions made pursuant to this ordinance, shall be returned to the person, firm or corporation making the same, or to his or its assigns.

Each general deposit made pursuant to the provisions of this ordinance may be returned at any time to the person, firm or corporation making the same, or to his or its assigns, after first making the deductions therefrom authorized by this ordinance; provided, however, that the city of Los Angeles shall retain, of each such general deposit, such amounts and for such period of time as would be required by this ordinance if the amount of such general deposit had been paid as special deposits for permits for the several excavations made by reason of such general deposit.

SEC. 11. The decision of the board of public works as to the cost of any work done or repairs made by it or under its direction pursuant to the provisions of section 7 or section 8 of this ordinance shall be final and conclusive as to such cost.

36 SEC. 12. On Friday of each week the board of public works shall deposit in the city treasury all moneys received by the said board pursuant to this ordinance during the preceding week.

SEC. 13. All moneys refunded pursuant to the provisions of this ordinance shall be paid upon demands audited and paid in the same manner as other demands against the city are audited and paid.

SEC. 14. All excavations, refilling of excavations and repairing of street surfaces, pursuant to the provisions of this ordinance, shall be made under the supervision and direction of the board of public works. It shall be the duty of the said board to supervise and direct all such making and refilling of excavations and repairing of street surfaces, and to require that all such excavations, refilling and repairing comply with the requirements of the ordinances of the said city.

SEC. 15. It shall be unlawful for any person, firm or corporation to install, or to cause or permit to be installed, any service pipe or main pipe, conduit, duct, tunnel or other structure, except manholes, culverts and catch-basins, in any public street, alley or other public place, at a distance of less than two feet below the established grade of the gutter of such public street, or alley, or less than two feet below the surface of such other public place.

SEC. 16. It is hereby made the duty of every person, firm or corporation owning, using, controlling or having an interest in pipes, conduits, ducts or tunnels under the surface of any public street, alley, sidewalk or other public place for supplying or conveying gas, electricity, water, steam, ammonia or oil in, to or from the city of Los

Angeles, or to or from its inhabitants, or for any other purpose, within ninety days after the passage of this ordinance, to file in the office of the city engineer a map or a set of maps, each drawn
37 to a scale of not less than 200 feet to one inch, which said map or set of maps shall show in detail the exact location, size, description and date of installation, if known, of all mains, laterals, services and service pipes, and of all valves, pressure regulators, drips, manholes, handholes, transformer chambers or other appliances installed beneath the surface of the public streets, alleys, sidewalks or other public places in the city of Los Angeles, belonging to, used by or under the control of such person, firm or corporation, or in which such person, firm or corporation has any interest. It shall also be the duty of every such person, firm or corporation to file, within fifteen (15) days after the first day of January of each and every year, a corrected map or set of maps each drawn to a scale of not less than 200 feet to one inch, showing the complete installation of all such pipes and other appliances, including all installations made during the previous year, to and including the last day of such year. Each such map shall be accompanied by an affidavit endorsed thereon, subscribed and sworn to by such person, or by a member of such firm or by the president or secretary of such corporation, to the effect that the same correctly exhibits the details required by this ordinance to be shown thereon.

Whenever any pipe, conduit, duct, tunnel or other structure located under the surface of any public street, alley or other public place, or the use thereof, is abandoned, the person, firm or corporation owning, using, controlling or having an interest therein, shall, within thirty days after such abandonment, file in the office of the city engineer a statement in writing, giving in detail the location of the pipe, conduit, duct, tunnel or other structure so abandoned. Each map or set of maps filed pursuant to the provisions of this section shall show in detail the location of all such pipes, con-
38 duits, ducts, tunnels or other structures abandoned subsequent to the filing of the last preceding map or set of maps. It shall be unlawful for any person, firm or corporation to fail, refuse or neglect to file any map or set of maps at the time, and in all respects as required by this section.

SEC. 17. It shall be unlawful for any person, firm or corporation to make, or to cause or permit to be made, any excavation in any unimproved public street, alley or other public place for the purpose of removing soil or gravel therefrom, or to remove, or to cause or permit to be removed therefrom, any soil or gravel, without first obtaining a permit in writing from the board of public works of the said city so to do, as hereinafter in this section provided.

Any person, firm or corporation desiring to remove any soil or gravel from any unimproved public street, alley or other public place, or to make any excavation therein for the purpose of removing soil or gravel therefrom, shall make a written application therefor to the board of public works, which application shall state the place where such excavation is proposed to be made, or where such soil or gravel is proposed to be removed, the extent of such proposed ex-

cavation, and the quantity of soil or gravel proposed to be removed. The said board of public works shall have power to grant or refuse such permit as in its judgment the public interest or convenience may require. If such application be granted the said board of public works shall issue a written permit to the applicant therefor, which permit shall specify the place where such excavation may be made and the extent thereof, or the place from which soil or gravel may be removed and the quantity to be removed, and the time within which such work shall be commenced, done and completed; provided, however, that if the grade of any such un-
39 improved public street, alley or other public place has been established, no permit shall be issued to make any excavation therein or to remove any soil or gravel therefrom below the established grade, and provided further, that no material shall be removed from any public street, alley or other public place in such a manner as to render such street, alley or other public place impassable or dangerous to public travel.

Before any permit is granted pursuant to the provisions of this section, the applicant therefor shall pay to the board of public works the sum of five (5) cents per lineal foot of street, alley or other public place along which a permit to excavate is issued, and shall also make a deposit with the board of public works to cover the cost of inspection as hereinafter in this section specified. Such applicant shall also execute and deliver to the said board of public works a good and sufficient bond in favor of the city of Los Angeles, with two or more sureties, to be approved by the board of public works, in such amount as the board of public works shall determine, which bond shall be conditioned that the work to be done pursuant to such permit shall be performed in a good and workmanlike manner, in strict accordance with the provisions of this ordinance, and to the satisfaction of the board of public works. Such bond shall be also conditioned that the person, firm or corporation named in the permit will save the said city harmless from any and all loss or damage that may be sustained by any person, firm or corporation by reason of the making of such excavation or the removal of such soil or gravel, as the case may be. Such bond shall inure to the benefit of any person, firm or corporation who shall sustain any loss, damage or injury by reason of the making of such excavation or the removal of such soil or gravel.

40 No such permit shall be issued unless there is first filed with the board of public works a waiver of damages signed by all owners of property fronting upon that portion of the street along which it is proposed, by such application, to excavate or to remove soil or gravel.

The making of all excavations in and the removal of all soil or gravel from public streets, alleys or other public places, pursuant to the provisions of this section, shall be at all times done to the satisfaction of the board of public works and subject to the inspection and supervision of the said board, which shall designate an inspector therefor. The amount of the deposit to cover the cost of such inspection and supervision shall be the sum of one ($1) dollar

for each one hundred (100) lineal feet, or fraction thereof, of each public street, alley or other public place to be excavated, or from which soil or gravel is to be removed; provided, however, that no deposit to cover the cost of such inspection shall be less than ten ($10) dollars under any permit issued in accordance with the provisions of this section. The said city shall retain such deposit until the work of excavating in or removing soil or gravel from such unimproved street, alley or other public place shall have been completed. It shall then deduct from such deposit the cost of such inspection as shall have been necessary to determine that the provisions of this ordinance have been strictly complied with, and shall thereupon immediately return and refund to the person, firm or corporation making such deposit, or to his or its assigns, the balance of such deposit after the deductions hereby authorized shall have been made.

SEC. 18. Any person, firm or corporation engaged in the making or refilling of any excavation in any public street, alley or other public place shall, at all times while such work is in progress,
41 keep at the place where such excavation is located the original permit (or the number thereof) for such excavation and must on demand, exhibit the same to the board of public works, or to any of its inspectors or other employees or to any police officer.

SEC. 19. It shall be unlawful for any person, firm or corporation to make, or to cause or permit to be made, any excavation under, or to remove, or to cause or permit to be removed, any earth, dirt or other formation from under that portion of any sidewalk lying between the outer curb line and any point in such sidewalk for (4) feet distant from such curb line, or under any alley within three (3) feet of the center line of such alley, or to construct, or to cause or permit to be constructed, any wall or other structure under any sidewalk within four (4) feet of such curb line, or under any alley within three (3) feet of the center line of such alley.

Provided, however, that the board of public works may, in its discretion, issue permits for the making of excavations under that portion of any sidewalk lying between the outer curb line and any point in such sidewalk four (4) feet distant from such curb line and below a line parallel with and twelve (12) feet distant beneath the surface of such sidewalk, and may also, in its discretioon, issue permits to maintain any excavation heretofore lawfully made under that portion of any sidewalk lying between the outer curb line and any point in such sidewalk four (4) feet distant from such curb line and above a line parallel with and distant twelve (12) feet below the surface of such sidewalk. Any permits issued under the provisions of this paragraph may be revoked by the board of public works at any time it may become necessary to construct any sewer, water main or pipe line or conduit or other public work of any kind along, in or through the excavation constructed or maintained under
42 the authority of such permit and the city of Los Angeles shall have the right to use any portion of any such excavation for the construction and maintenance of any such sewer, water main, pipe lines, conduit or other public work or improvement.

Any such excavation shall be so constructed and maintained as to afford lateral, sublateral, adjacent or overhead support of the surrounding embankments and structures satisfactory to the board of public works. Before any such permit is issued a detailed plan of such excavation, showing the proposed location thereof, and all appurtenances thereto, shall be filed in the office of the board of public works.

And provided further, that the board of public works may, in its discretion, issue permits for the making of excavations under alleys for the purpose of installing, constructing and maintaining oil storage tanks, as provided by this section. Every tank installed, constructed or maintained pursuant to any such permit, within the boundaries of such fire districts as are now or may be hereafter established by ordinance shall be so constructed that the top thereof shall not be less than twenty (20) feet below the surface of the alley in which such tank is so installed, constructed or maintained. Every tank installed, constructed or maintained, pursuant to any such permit in any portion of the city outside of said fire districts shall be so constructed that the top thereof shall not be less than fourteen (14) feet below the surface of the alley in which such tank is so installed, constructed or maintained. No such tank shall be of a size sufficient to contain more than four thousand (4000) gallons, and shall be used only for the storage of crude petroleum or distillate for use as fuel in buildings designated as Class A, Class B or Class C in the ordinances of the city of Los Angeles regulating the construction of buildings. Any such permit
43 may be revoked at any time by the board of public works and upon such revocation any tank so installed, constructed or maintained pursuant to any such permit, shall be at once removed from such alley by the person, firm or corporation owning, having charge of or using such tank. If, at any time, it become necessary to construct any sewer, water mains, or other pipe line or conduit or other public work of any kind along or in such alley, such tank, or such portion thereof as may be necessary, shall be so removed as to permit the construction of such sewer, water main or other pipe line, or conduit, or other public work. If any such permit be revoked, or if it become necessary to remove any such tank or any portion thereof for the purpose of allowing the construction of a sewer, water main or other pipe line or conduit, or other public work, and the person, firm or corporation owning, having charge of or using such tank shall fail, refuse or neglect to remove the same within twenty (20) days after service of notice by the board of public works so to do, then the board of public works shall remove such tank or so much thereof as may be necessary for such purpose, and the city shall have the right to recover the cost of such removal from such person, firm or corporation. Before any such permit is issued a detailed plan of such tank and all appurtenances thereto shall be filed in the office of the board of public works, which plan shall show the proposed location of such tank in such alley.

SEC. 20. None of the provisions of this ordinance shall apply to any work done or to be done along, in or upon any public street

alley or other public place pursuant to any law of the state of California, providing for the improvement thereof, or to any work done or to be done along, in or upon any such street, alley or other public place pursuant to any contract for improvement authorized by the city council; provided, however, that the provisions contained in section 6 of this ordinance shall apply to all such work and to all excavations to be made along, in or upon any public street, alley or other public place.

SEC. 21. The provisions of this ordinance shall not apply to excavations made by any department board or officer of the city of Los Angeles in the discharge of its or his official duties.

SEC. 22. Nothing in this ordinance contained shall be construed to prevent any person, firm or corporation, maintaining any pipe or conduit in any public street, alley or other public place, by virtue of any law, ordinance or permit, from making such excavation as may be necessary for the preservation of life or property when such necessity arises during such hours as the offices of the city are closed; provided, that the person, firm or corporation making such excavation shall obtain a permit therefor within four (4) hours after the offices of the city are first open subsequent to the making of such excavation.

SEC. 23. Every permit for an excavation in or under the surface of any public street, alley or other public place shall be granted subject to the right of the city of Los Angeles or of any other person, firm or corporation entitled thereto, to use that part of such street, alley or other public place for any purpose for which such street, alley or other public place may lawfully be used.

SEC. 24. That any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not less than ten ($10) dollars nor more than five hundred ($500) dollars, or by imprisonment in the city jail for a period of not less than five (5) days nor more than six (6) months, or by both such fine and imprisonment.

Each such person, firm or corporation shall be deemed guilty of a separate offense for every day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted by such person, firm or corporation, and shall be punishable therefor as provided by this ordinance.

SEC. 25. That Ordinance No. 18,375 (New Series), entitled, "An ordinance regulating the making and refilling of excavations in public streets, alleys, sidewalks and other public places," approved July 2, 1909, and all other ordinances and parts of ordinances in conflict with this ordinance be, and the same are hereby repealed; provided that any such repeal shall not affect or prevent the prosecution and punishment of any person, firm or corporation for any act done or permitted in violation of any ordinance which may be repealed by this ordinance, and shall not affect any prosecution or action which may be pending in any court for the violation of any ordinance repealed by this ordinance.

SEC. 26. That the making and refilling of excavations in the

public streets, alleys, sidewalks and other public places in a manner other than as provided by this ordinance is an immediate menace to the safety of the citizens of the city of Los Angeles, and therefore, this ordinance is urgently required for the immediate preservation of the public peace, health and safety; and the city clerk shall certify to its passage by a unanimous vote, and cause the same to be published once in The Los Angeles Daily Journal, and thereupon and thereafter it shall take effect and be in force.

I hereby certify that the foregoing ordinance was passed by the council of the city of Los Angeles by the unanimous vote of all the members of said council present, there being not less than
46 seven members present at its meeting of February 20, 1912.

LORIN A. HANDLEY,
City Clerk.

Approved this 21st day of February, 1912.

GEO. ALEXANDER, *Mayor.*

EXHIBIT B.

Ordinance No. 23,624.

(New Series.)

An ordinance prescribing a method of procedure for the granting of franchises, permits and privileges in, on, through, across, under and over streets, highways and other public places in the city of Los Angeles.

The mayor and council of the city of Los Angeles do ordain as follows:

SECTION 1. No person, firm or corporation shall exercise any franchise, permit or privilege mentioned in this ordinance except in so far as such person, firm or corporation may be entitled to do so by direct and unlimited authority of the constitution of the State of California, or of the constitution or laws of the United States, in, upon, over, under or along any street, highway or other public place in the city of Los Angeles, unless such person, firm or corporation shall have obtained a grant therefor in accordance with the provisions of the charter of said city and of the procedure prescribed by this ordinance and in accordance with the provisions of the ordinance granting such franchise, permit or privilege.

SEC. 2. Every franchise, permit or privilege hereinafter enumerated in this section shall be granted by ordinance in accordance with the method of procedure prescribed by this ordinance. The franchises, permits or privileges contemplated by this ordinance shall include:

47 (1) Every franchise, permit or privilege to construct, maintain or operate a street railroad along, upon, over, in, under or across any street, lane, alley, court, highway, road or other public place.

(2) Every franchise permit or privilege to construct, maintain or operate an interurban railroad along, upon, over, in, under, or across any street, lane, alley, court, highway, road or other public place, and whether the same is to be operated on the surface, in subways, or upon an elevated structure.

(3) Every franchise, permit or privilege to construct, operate or maintain an underground street railroad through subways, and for the construction, operation and maintenance of elevated street railways, along, across, under, in or over any street, highway, lane, court, alley or other public place.

(4) Every franchise, permit or privilege to construct, maintain or operate pipes, tubes or conduits along, upon, over, in, under or across any lane, street, alley, court, highway, road or other public place in said city for the purpose of transmitting water, gas, heat, steam, oil, air, substances for refrigerating, containers with merchandise through compressed air tubes, or other substance or utility.

(5) Every franchise, permit or privilege to erect, construct, lay, maintain and operate poles, pipes, conduits, wires or cables upon, over, under, in, across or along any street, lane, court, highway, road or other public place in said city, for the purpose of transmitting power, heat, electricity or electric energy or for communication by telephone, telegraph or signal systems.

Nothing in this ordinance shall be construed as applying to the granting of permits and privileges to construct or maintain steam railroad tracks, spur tracks, or connecting curve tracks at
48 street intersections, nor to the granting of franchises for the transportation, carrying or hauling of freight over any street or interurban railroad tracks in the city, but all such grants shall be made as otherwise provided by law or by ordinances of said city.

SEC. 3. Every applicant for a franchise, permit or privilege mentioned in section 2 of this ordinance shall file or heretofore shall have filed with the council an application therefor in writing, setting forth in such application the name and address of such applicant, a description of the franchise, permit or privilege applied for, and the streets, highways or other public places along, upon, over, in, under or across which it is proposed to exercise such franchise, permit or privilege.

SEC. 4. Every application made to the council for a franchise, permit or privilege mentioned in this ordinance shall, before any action is taken thereon, be referred by the council to the board of public utilities for its recommendation respecting the same. The board of public utilities shall proceed to inquire into such application and within thirty days after such application shall have been referred to it, or longer if allowed by the council, shall report to the council its recommendation relative thereto. If in the judgment of the said board of public utilities the franchise, permit or privilege applied for should not be advertised for sale or granted, it shall so report, stating its reasons therefor; and if, in the judgment of said board, such franchise, permit or privilege should be granted, it shall recommend the terms and conditions upon which the same shall be granted. No franchise, permit or privilege

mentioned in this ordinance shall be advertised for sale or granted unless the application therefor shall have been referred to the board of public utilities; provided, however, that if said
49 board shall fail to report thereon within the time herein prescribed, or as extended by the council, nothing herein contained shall be construed to prevent the council, at its discretion, from proceeding to advertise such franchise, permit or privilege for sale or from awarding the same as provided by this ordinance. No franchise, permit or privilege mentioned in this ordinance shall be offered for sale or granted contrary to the recommendation of said board of public utilities, except upon a three-fourths vote of the entire council.

SEC. 5. (1) The council shall, if it proposes to grant any such franchise, permit or privilege, advertise the fact of such application, together with a statement that it is proposed to grant the same, daily for a period of ten days, in a daily or by two successive insertions in a weekly newspaper of general circulation, printed, published and circulated in said city.

(2) Such advertisement shall state the character of the franchise, permit or privilege proposed to be granted, and, if it be for a street railroad or an interurban railroad or an underground or elevated street or interurban railroad, the route to be traversed; that sealed bids therefor will be opened at a stated time and place, and that the franchise, permit or privilege will be awarded to the bidder offering

(*a*) To pay to the city during the life of the franchise, permit or privilege the highest percentage of net annual receipts received from the use, operation or possession of such franchise, permit or privilege; provided that such percentage shall be not less than fifty per cent of said net annual receipts; provided further, that where the application is for the grant of a franchise, permit or privilege for any of the purposes enumerated in subdivision- 1, 2 and 3 of section 2 of this ordinance, then and in that event the per-
50 centage of net annual receipts to be paid shall be upon net annual passenger receipts; provided further that if the franchise, permit or privilege be for a street railroad or an interurban railroad or an underground or an elevated raiload which shall extend beyond the limits of the city of Los Angeles, then and in that case the percentage of net receipts above specified shall be computed or reckoned as follows: The total annual car mileage of such railroad within and without the city shall be compared to the total annual car mileage of the said railroad within the city, and such fraction of the entire net receipts for the whole of said railroad, within and without the city, as the total car mileage of such railroad within the city, is of the total annual car mileage of the whole railroad, shall be deemed and considered the net receipts upon which the percentage to be paid into the city treasury shall be reckoned; and provided further that in computing the net receipts a percentage of which is to be paid annually for the exercise of any franchise, permit or privilege, no account shall be taken of, and no allowance or deduction shall be made for, any payments made, or claimed to be due or payable, or claimed to be allowable for interest or dividends

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on stocks or bonds or on any investment in any form whatever, in the plant, property or system of the person, company or corporation holding, enjoying and exercising such franchise; provided, that, in computing such net receipts, there may be deducted annually from the gross receipts arising from the exercise of such franchise, permit or privilege a sum equal to five per centum of the amount of money actually and necessarily expended in the purchase and installation of the property and equipment intended for and actually used in such exercise; or

(*b*) To pay to the city during the life of the franchise, permit or privilege the highest percentage of gross annual receipts
51 received from the use, operation or possession of such franchise, permit or privilege; provided that such percentage of gross annual receipts shall not be less than two per cent of such gross annual receipts; or,

(*c*) To pay to the city the highest stated sum as compensation for the use, operation or possession of such franchise, permit or privilege for the entire term of such grant; or,

(*d*) To pay to the city the highest annual or monthly compensation for the use, operation or possession of such franchise, permit or privilege during the term of said grant; or,

(*e*) The best terms by way of service, and rates or compensation for service rendered by the grantee under such franchise, permit or privilege; or,

(*f*) To pay to the city such other compensation or consideration for the use, operation or possession of such franchise, permit or privilege as may be prescribed by the council in the advertisement for bids and notice of sale.

Provided that the council may, in said advertisement for bids and notice of sale, invite bids on any one or all or any number of the bases hereinbefore in this subdivision enumerated.

The terms and conditions to be imposed upon the grantee on account of the use, operation or possession of such franchise, permit or privilege shall be included in said advertisement for bids and notice of sale.

(3) The procedure for receiving bids and awarding any franchise, permit or privilege, shall be as follows:

All sealed bids shall be delivered to and filed with the city clerk, and at the time and place specified in said advertisement the council shall, in open session, examine and publicly declare the
52 same; provided, however, that no bid shall be considered unless accompanied by the cash deposit or certified check as hereinafter provided. Upon the opening and declaration of such bids by the council, any responsible person, firm or corporation may raise the bid for such franchise, permit or privilege above the highest sealed bid therefor, on any one of the bases of compensation mentioned in the last preceding subdivision of this section and included in the advertisement for bids and notice of sale. Such bidding may thereafter continue until finally such franchise, permit or privilege shall be struck off, sold and awarded by the council to the highest bidder; provided, that if, in the judgment of the

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council, no adequate or responsible bid has been made, the council may withdraw any franchise, permit or privilege from sale, or advertise for new bids.

(4) Every application for a franchise, permit or privilege shall be accompanied by a cash deposit of one hundred dollars($100), or by a certified check for said amount, payable to the city treasurer and certified to by some responsible bank in the city of Los Angeles, as a fund out of which to pay all expenses connected with such application, and every bid shall be accompanied by a cash deposit of five hundred dollars ($500), or a certified check for said amount, payable to the city treasurer, certified to by some responsible bank in the city of Los Angeles, as a guarantee of good faith by the bidder.

Upon the franchise, permit or privilege being awarded, all deposits made by unsuccessful bidders shall be returned. The deposit of the successful bidder shall be retained until the approval and filing of the bond hereinafter provided for whereupon the remainder of such deposit, after the payment therefrom of all expenses incurred by the city in connection with the advertising and
53 awarding of such franchise, permit or privilege shall be returned.

(5) No clause or condition of any kind shall be inserted in any advertisement of any franchise, permit or privilege, offered for sale under the terms of this ordinance which shall directly or indirectly restrict free and open competition in bidding therefor.

SEC. 6. The grantee of such franchise, permit or privilege, shall within five (5) days after the awarding of such franchise, permit or privilege, file with the city clerk of the said city a bond running to the said city in the penal sum fixed by the council in the advertisement for bids, and within thirty (30) days after the filing and approval of such bond such franchise, permit or privilege shall be granted by ordinance, subject to the referendary provisions of the charter, to the person, firm or corporation to whom it shall have been struck off, sold or awarded; and in case such bond shall not be so filed, the award of such franchise, permit or privilege shall be set aside and shall, in the discretion of the council, be re-advertised and again offered for sale in the same manner and under the same restrictions as hereinbefore provided, and the amount deposited by such bidder with his bid shall be forfeited to the city as liquidated damages.

SEC. 7. Nothing in this ordinance shall be construed as preventing the council from inserting in any advertisement for bids and notice of sale or in any ordinance granting any franchise, permit or privilege any conditions or requirements not inconsistent with the provisions of the constitution of the state or of the city charter.

SEC. 8. The city clerk shall certify to the passage of this ordinance by a unanimous vote and cause the same to be published once in the Los Angeles Daily Journal.

54 I hereby certify that the foregoing ordinance was passed by the council of the city of Los Angeles by the unanimous

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vote of all the members of said council present, there being not less than seven members present, at its meeting of October 24, 1911.

LORIN A. HANDLEY,
City Clerk.

Approved this 26th day of October, 1911.

GEO. ALEXANDER, *Mayor.*

55 By the COURT:

On reading and filing the within petition it is ordered that the writ of habeas corpus issue as therein prayed returnable before the Supreme Court in banc at Los Angeles on Monday, April 15, 1912, at two o'clock p. m.

Ordered further that the prisoner be admitted to bail pending the further order of the court and be released from custody upon the filing of a bond approved by a judge of the Superior Court of Los Angeles in the sum of $500.00.

BEATTY, *C. J.*

March 6, 1912.

56 Due service of the within, and receipt of a copy hereof, is hereby admitted this — day of March, A. D. 1912.

——— ———,

——— ———,

Attorneys for Respondent.

57 In the Supreme Court of the State of California.

In the Matter of the Application of ROBERT RUSSELL for a Writ of Habeas Corpus.

Return.

To the Honorable the Supreme Court of the State of California.

GENTLEMEN: In obedience to the annexed Writ I certify and return to the Honorable Supreme Court that on the 1st day of March, 1912, Robert Russell was arraigned in the Police Court of the City of Los Angeles on a misdemeanor charge of excavating in the streets of the City of Los Angeles without a permit so to do, in violation of the terms of Ordinance No. 24,140 (New Series) of said City, regulating the making and refilling of excavations in public streets in the City of Los Angeles, a copy of which said ordinance is set out in petitioner's petition and marked "Exhibit A"; that he pleaded not guilty to the said charge, and was, by the Judge of said Court, ordered to put up bail in the sum of Twenty-five Dollars, or in lieu thereof be placed in the City Jail of the City of Los Angeles pending his trial; that I, as Chief of Police of the said City of Los Angeles at the time mentioned, and at the present time, was in charge of said jail and therefore had the said Robert Russell in my custody.

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That upon the coming of your said writ of habeas corpus to me, namely, on the 7th day of March, 1912, with the order en-
58 dorsed on said writ that the prisoner, Robert Russell, be admitted to bail in the sum of $500.00 pending the further order of the Supreme Court, and upon the said prisoner, Robert Russell furnishing the said bail and depositing the same in accordance with the said Court's order, I, on the said 7th day of March, 1912, released the said Robert Russell from my custody.

Wherefore, I cannot have the body of said Robert Russell before the Supreme Court at the time commanded as by the said writ of habeas corpus I am commanded.

To all of which I certify.

C. E. SEBASTIAN,
Chief of Police of the City of Los Angeles,
County of Los Angeles, State of California.

Dated at Los Angeles, County of Los Angeles, State of California, this 13th day of April, 1912.

59 *Habeas Corpus.*

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

In the Supreme Court of the State of California.

The People of the State of California to Charles E. Sebastian, Chief of Police, Los Angeles County, Greeting:

We command you, That you have the body of Robert Russell by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention by whatsoever name said Robert Russell shall be called, or charged, before the Hon. Supreme Court, at Los Angeles, Bullard Block, on the 15th day of April, A. D. 1912, at 2 o'clock P. M. of that day, to do and receive what shall then and there be considered concerning the said Robert Russell. And have you then and there this writ.

By order of Supreme Court.

Ordered further that the prisoner be admitted to bail pending the further order of Court and be released from custody upon the filing of a bond approved by a judge of the Superior Court of Los Angeles in the sum of $500.00.

Witness, the Hon. W. H. Beatty, Chief Justice of the Supreme Court aforesaid, with the seal thereof hereunto affixed, this 6th day of March, A. D. 1912.

Attest.

[SEAL.]

B. GRANT TAYLOR, *Clerk.*
By I. ERB, *Deputy Clerk.*

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60 Crim. 1733.

In re ROBERT RUSSELL on Habeas Corpus.

By the COURT:

All of the briefs having been filed pursuant to an order entered herein April 15th, 1912, matter submitted as of this date.

HENSHAW, *Acting C. J.*

June 11, 1912.

Filed June 11, 1912. B. Grant Taylor, Clerk, By —— ——, Deputy.

61 Crim. No. 1733. In Bank. September 13, 1912.

In re ROBERT RUSSELL. Petition for a Writ of Habeas Corpus.

[1] Municipal Corporations—Los Angeles—Laying of Gas Mains in Streets—Permission of Municipality—Valid Ordinance.—An ordinance of the city of Los Angeles forbidding the laying of pipes in the streets of the city for the purpose of transmitting gas, water, heat, steam or other substance without having first obtained a grant thereof from the city in accordance with the city charter and such ordinance is enforcible against an existing gas company engaged in extending its service into new territory within the city.

[2] Id.—Constitutional Law—Laying of Pipes in Streets of Municipality—Power of Municipality Under Constitutional Amendment of 1911.—Under the amendment of October 10, 1911, to section 19 of article XI of the constitution, providing that any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication, and that persons or corporations may establish and operate works for supplying the inhabitants with such services "upon such conditions and under such regulations as the municipality may prescribe under its organic law," a municipality has power to forbid the use of its public streets by public service corporations, except upon such conditions and under such regulations as the municipality chooses to prescribe within the provisions of its charter.

[3] Id.—Statutory Construction—Object and Purpose of Amendments—Conditions Existing at Adoption.—The first step in the application and interpretation of an amendment to a constitution or statute is to consider the conditions existing prior to its adoption, so as to ascertain its objects and purposes.

[4] Id.—Municipal Corporations—Operation of Public Utilities—Power Prior to Constitutional Amendment.—Prior to the amendment of section 19 of article XI of the constitution on October 10, 1911, municipal corporations, unless specially authorized by charter, were without power to make or operate the several public utilities mentioned in the amended section.

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[5] Id.—Id.—Effect of Constitutional Amendment.—The effect of the constitutional amendment is to make all municipal corporations a direct grant of power to make and operate public works of the kinds therein enumerated, and as to works of like kind to be operated privately, the design was to place them all in control of the municipality.

[6] Id.—Id.—Laying of Mains in New Streets—Right of Existing Companies Subsequent to Amendment.—A corporation engaged in supplying a municipality with gas acquired no vested rights under the constitutional grant given prior to the amendment of 1911 to lay pipes thereafter in streets not before used for that purpose.

[7] Id.—Id.—Constitutional Grant Prior to Amendment—Scope—Accepted and Used Streets.—The grant given by section 19 of article XI of the constitution prior to the amendment of October 10, 1911, to any individual or corporation to lay pipes in the streets of a municipality for the purpose of supplying its inhabitants with gas or water extended only to such streets as were accepted and used for such purpose.

[8] Id.—Statutory Construction—Grants of Public Rights.—It is an established principle of construction, applicable to constitutions as well as to statutes, that grants thereby made to private persons or public service corporations of rights belonging to the state or to the public "are to be construed most strongly in favor of the public."

Application for Writ of Habeas Corpus Prayed to be Directed Against Charles E. Sebastian, Chief of Police of the City of Los Angeles.

62 For Petitioner—Chickering & Gregory; Trippet, Chapman & Biby; H. H. Trowbridge; Gibson, Dunn & Crutcher, O'Melveny, Stevens & Milliken; Guy C. Earl.

For Respondent—Guy Eddie, City Prosecutor, Los Angeles; John W. Shenk, City Attorney, Los Angeles; Wm. J. Carr, City Attorney, Pasadena; Percy V. Long, City Attorney, San Francisco; Thos. E. Haven, Assistant City Attorney, San Francisco.

The petitioner alleges that he is in custody upon a charge of having violated an ordinance of the city of Los Angeles.

The ordinance referred to was approved by the mayor on February 21, 1912. It declares that it shall be unlawful for any person, firm or corporation to make any excavation in a street for any purpose without first obtaining permission in writing from the board of public works, and that before issuing the permit the board must require the applicant therefor to state the purpose for which the excavation is to be made and show legal authority to occupy and use the street for that purpose. A violation of any provision of the ordinance is declared to be a misdemeanor, punishable by fine or imprisonment, or both.

Another ordinance, approved October 26, 1911, provides that no person, firm or corporation shall exercise any franchise, or privilege to lay or maintain pipes or conduits in or under any street of the

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city for the transmission of gas, water, heat, steam or other substance, without having first obtained a grant therefor from the city in accordance with the city charter and said ordinance, unless such person, firm or corporation is entitled to do so "by direct and unlimited authority of the constitution of the State of California, or of the constitution and laws of the United States."

On the 10th of October, 1911, section 19 of article XI of the state constitution was amended. The city council passed these ordinances in the belief that by this amendment the city was given authority to forbid the use of public streets by public service corporations, unless the city should have first granted a franchise permitting such use. The petitioner was engaged in laying a gas pipe in the street as a part of the distributing system of a corporation engaged in supplying gas to the inhabitants of the city, known as the Economic Gas Company. He claims, first, that the gas company is directly authorized by said amendment to lay gas mains in the street as a part of its works for supplying gas, and hence, that the city cannot forbid it from so doing; and, second, that because of the fact that it had established its works, laid some mains and began supplying gas before the adoption of the amendment, it had a vested right to extend its mains and lay them in streets not before used by it for that purpose, a right which the city could not restrict by ordinance, nor the people take away by constitutional amendment. These claims present the questions herein to be considered. We will take them up in the order stated:

1. Section 19, article XI, as amended, is as follows: "Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such
63 works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

[3] The first step in the application and interpretation of an amendment to a constitution or statute is to consider the conditions existing prior to its adoption, so as to ascertain its objects and purposes. [4] At the time this amendment was adopted municipal corporations, unless specially authorized by charter, were without power to make or operate the several public utilities mentioned in the amended section. (Von Schmidt v. Widber, 105 Cal. 157; Hyatt v. Williams, 148 Cal. 585; Platt v. San Francisco, 158 Cal. 82.) Natural persons had full liberty to do so and private corporations could secure the power by filing the proper articles of incor-

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poration. There had apparently arisen a general opinion among the people that municipal ownership and operation of such public utilities was desirable. [5] Considering the language of the amendment in the light of these circumstances, its effect is plain. It is one of the evidences of a prevailing sentiment in favor of such municipal activities. It first makes to all municipal corporations a direct grant of power to make and operate public works of the kinds enumerated. As to works of like kind to be operated privately, the design was to place them all in control of the municipality. Following out this design, the succeeding provision expressly limits the pre-existing powers and rights available to private corporations and natural persons. They are permitted to engage in such enterprises within the city only "upon such conditions and under such regulations as the municipality may prescribe."

The use of the word "regulations" as something distinct from "conditions," implies a broader meaning in the latter word than mere regulation of the manner of use. In ordinary use, in this connection, the word "condition" means something established "as a requisite to the doing or taking effect of something else." (Webster's Dict.) In law, it means "a qualification, restriction or limitation modifying or destroying the original act with which it is connected," or defeating, terminating or enlarging an estate granted. (1 Bouv. Dict., 382.) The conditions and regulations are to be such as the city "may prescribe under its organic law." There is no other qualification of the words. The conditions prescribed may therefore include every kind, conditions precedent, as well as conditions subsequent, if they may be made under the city charter. The charter of Los Angeles gives the city power to prescribe the character and quality of any public utility service, to fix the rate of compensation therefor, to regulate conduits and works or
64 plants for the production, transmission and distribution of gas, and to grant franchises or privileges in, on, across, under, or over the streets, and prescribe the terms thereof. If the taking effect of this constitutional provision in any city depends on the existence of provisions in its organic law giving the city power to make conditions, then these provisions of the Los Angeles charter give that city power to prescribe the conditions expressed in the ordinances above mentioned. But we think the provision itself, by necessary implication, gives each city power to prescribe conditions.

[2] To give the city power to prescribe the conditions upon which persons and corporations may establish and operate such works, is to place the entire subject matter within the control of the city and, in effect, to provide that no such person or corporation may do so without obtaining the privilege from the city by a grant specifying the conditions it chooses to prescribe. With respect to the mode of imposing and enforcing the conditions, the city is, of course, bound by the provisions of its charter. If conditions are found in the charter itself, the legislative authority of the city will be bound thereby and could not impose inconsistent conditions, nor abrogate those of the charter. In such a case the city would be imposing the conditions by its organic law and all grants

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by the city legislative body would be required to conform thereto. We need not here determine whether, in the absence of anything in the charter or city ordinances forbidding it, such persons or corporations, under their general powers, could go on to establish and operate such works without asking the consent of the city, or whether such action would be unlawful without affirmative permission from the city. It is sufficient for the disposition of this case to say that where the city has prescribed conditions, they must be observed, or the construction and operation of such works will be unlawful.

It is argued that this gives the city power to refuse to grant such franchises and that this would allow the city to create monopolies by limiting such grants to a single person or corporation, that this would be against public policy, and hence that this construction is not permissible. Opinions are variant upon the question whether, in the case of public utilities in cities, monopolies are, or are not, detrimental to the general good. In 1885, when section 19, as it stood prior to October 10, 1911, was adopted, the general opinion doubtless was against such monopolies. Subsequent experience of the effects of competition seems to have changed that opinion This is clearly indicated in the statement in favor of this amendment printed on the ballots by which it was adopted. It declares that such utilities are by nature monopolistic. Its adoption upon such a statement of reasons is strong evidence of a change of public sentiment on the question. The general opinion now seems to be that where municipal ownership is not feasible or attainable, a properly regulated monopoly is advisable. The amendment shows an intention to allow this policy to be determined by each city in its own behalf. It may establish works of its own, excluding all others; it may permit but one system of works by refusing more than one franchise; or it may encourage competition by allowing rival companies to enter the field, either in competition with its
65 own system or with those of others. We refer here to new systems, not to systems in operation prior to the amendment.

A consideration of the entire section in connection with all classes of public utilities mentioned therein shows that no other interpretation would be reasonable. It applies throughout to works for supplying the city with light, water, power, heat, with transportation of freight or passengers, and with telephone service or other means of communication. The claim of the petitioner is, in effect, that the third clause gives directly to every person or corporation desiring to establish and operate works of any of the kinds above mentioned the right to enter upon the streets of the city to establish and operate its system of works regardless of the wish or will of the city authorities, and that the power of the city to prescribe conditions is confined to such conditions as relate merely to the manner of establishing and operating the systems. If this is the effect of the clause, then the amendment greatly enlarges, instead of restricting, the privileges given directly to private persons and corporations in the streets. Formerly the right to use them extended only to water and lighting systems; now, if this claim is

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correct, the right vests in all persons and all corporations for the purposes mentioned. The right could be exercised after the city had established its own works as well as before. It would be unlimited with respect to the number of rival establishments. New street car lines could parallel existing lines, not only upon different streets, but upon the same streets, if there was space for another track. The city could only make conditions as to the manner of laying the track and operating the cars, and it would be a necessary qualification that the conditions must be reasonable and not of a character which would prevent the use or unreasonably restrict it. To give the amendment this meaning would make it almost the direct opposite of what it has been generally supposed to be. It is apparent, of course, that the language is not as clear to the contrary as it could be made in view of the claim here presented. But it is reasonably susceptible of the interpretation we have given it and we are satisfied that this construction is consistent with and in furtherance of its general intent and policy.

We have high authority to the same effect. In Pomona v. Sunset etc. Co., decided April 8, 1912, this provision was construed by the Supreme Court of the United States. The claim was substantially the same as that here made. It was urged that this provision constituted a grant to the telephone company of the right to use the streets of Pomona as a place on which to erect its poles and string its wires. That court dismissed the claim with this statement: "If the municipal corporation does not see fit to establish the public works itself, it may let others do it, but its power to impose conditions excludes the notion that the constitution alone is a grant to others of a right to occupy the streets without its consent."

[1] The ordinances are therefore valid and enforcible against the gas company and the petitioner as its employee, unless the claim that it has a vested right to extend its pipes is well taken. This brings us to the second question.

66 2. As a foundation for the second proposition, the petitioner shows that the works of said company were established and operated with the intent to supply gas in every section of the city and to lay pipes in every street, if necessary for that purpose, that to this end it constructed works of a size sufficient to supply gas to a much larger territory than it was supplying prior to October 10, 1911, and had expended in so doing $100,000 more than would have been required for works to supply only the territory reached by its pipes at that date, that it had laid and maintained its pipes in many streets of the city and had supplied gas thereby to the inhabitants in such streets for more than two years before said date, that prior to said date said company had made contracts with many of the inhabitants of the city to supply gas to them, that said contracts were still in force, and that, in order to perform them, it must extend its mains into streets not before used by it. All its works before that date were constructed in accordance with the provisions of the constitution existing prior to said amendment and in compliance with the existing regulations and directions of the city authorities. The petitioner was excavating a

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trench to lay gas pipes for said company in a street not before occupied or used by it for that purpose.

Prior to October 10, 1911, section 19 of article XI was as follows:

"In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

[7] The grant or offer set forth in this section is in the most general terms. It is not specific with respect to either places or persons. It is not made to a particular corporation, nor is it confined to any particular city. It is a general offer to any person and all corporations that may be organized for that purpose and it embraces all cities in the state. It is specific only with regard to the kind of privilege offered, towit: that of "using the public streets" and "laying down pipes and conduits therein . . . so far as may be necessary for introducing into and supplying said city and its inhabitants" with gas or water. No provision is made for any formal or written acceptance of the offer whereby a conveyance of a right to specified streets or within specified limits, or to all the streets of the particular city, might be manifested, which would be in the nature of a conveyance vesting the right in advance of, and regardless of, its use. No officer is empowered to take, receive, record or preserve such acceptance. The only means
67 whereby an effectual manifestation of acceptance can be made is the act of taking possession and occupying the street for the purpose allowed. Then, and not before, is the acceptance complete. Thus far the public grant extends, thus far the public property in the street is burdened and diverted to another use, thus far the grant is accomplished. There is nothing in the language of the section which can be fairly said to express the intention that the right offered should take effect in any street before it is actually used, or should vest as to all of them the moment that the use is begun in good faith in one.

[8] It is an established principle of construction, applicable to constitutions as well as to statutes, that grants thereby made to private persons or public service corporations of rights belonging to the state or to the public "are to be construed most strongly in favor of the public." (Clark v. Los Angeles, 160 Cal. 39; Sunset etc. Co. v. Pasadena, 161 Cal. 273, 118 Pac. 799.) "Only that which is granted in clear and explicit terms passes" by such grant. "Noth-

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ing passes by implication." (Knoxville v. Knoxville, 200 U. S. 33.) The grant to be made effective by actual use and acceptance of the constitutional offer, is not, under the rule of construction just stated, to be carried further by implication. [6] It is a necessary conclusion, therefore, that the vested right of the Economic Gas Company in the streets of Los Angeles at the time the constitution was changed, extended so far only as its actual occupancy and use of the streets then extended. The people had the right, at any time before acceptance, to repeal the provision and withdraw the offer. The investment of money in gas works designed to supply additional territory was not an acceptance and could not operate as an estoppel against the state or the people to divest them of their sovereign authority to change the constitution. The company must be deemed to have had knowledge of this sovereign power and to have assumed the risk that the power might be exercised before it had further availed itself of the existing offer.

The section has heretofore been considered, in some of its aspects, by this court. In People v. Stephens, 62 Cal. 209, its effect as an executed and completed grant of the right to lay pipes in the public streets was the question involved. It was held that no legislative action was necessary to give it force; that it constituted a direct grant from the people, through the constitution, to the corporation in charge of the public use of supplying gas or water, of the privilege of laying in the streets such pipes as were required to distribute the supply. The main question considered was that of the necessity of legislative action to put the constitutional provision in force. In In re Johnston, 137 Cal. 115, it was decided that this constitutional grant gave to the corporation desiring to accept it the privilege granted, free from any interference or supervision by the municipality, other than that authorized by the terms of the section, and, hence, that the city could not require such corporation to procure a permit as a condition precedent to such use of the streets. (See, also, South Pasadena v. Pasadena, 152 Cal. 586.) In Stockton etc. Co. v. San Joaquin County, 148 Cal. 313, the decision was that

> this franchise or privilege, when accepted and used, is
> 68 an incorporeal hereditament, an easement in the particular street and partaking of the realty, local in situation and taxable in the county in which the street is situated, the same as other real property, and that it is not one of, or a part of, the general corporate franchises to do business upon which corporations are taxable only in the county in which the principal place of business is situated.

In none of these cases was it necessary to consider the extent of the franchise acquired by acceptance of the constitutional offer, that is to say, whether it was acquired and became vested only as far as it was used at the particular time to which the inquiry related, or whether it was a general present grant of a right or estate in all the streets to which the proposed system was designed to extend, and which vested as to all of them the moment it was accepted and used in one. There are expressions, however, in several of the decisions which show that the understanding of the court has been that the acceptance did not become complete otherwise than

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by actual use, nor extend further than such use, and that the right vested at the time of such use and not before. In Stockton v. San Joaquin Co., supra, (318), speaking of such a franchise we said: "It is only acquired when the constitutional grant is actually accepted; when the pipes and conduits for gas or the electric poles are laid in or erected on the streets of the city." Corporations having the capacity to take "do not acquire it until they have accepted it by proceeding to its actual exercise." Such franchise "is indissolubly annexed to the street of a city in and upon which it is excercised." In South Pasadena v. Pasadena, supra, we said: "This right, when made available by actual possession and use, is a species of real property, appropriately designated as a franchise." The point, decided in Western Union Tel. Co. v. Hopkins, 160 Cal. 111-122, is, in principle, decisive of the precise question here involved. Referring there to the similar legislative grant to telegraph companies to construct telegraph lines along the highways of the state, contained in section 536 of the Civil Code, the court says it is similar to the constitutional provision in question here, and that it "would vest only when actually accepted by the exercise of the right granted" (p. 111); that "the exclusive occupation by a company of portions of public highways for the authorized purposes is an acceptance by it of the offered franchise" (p. 117); that the statute was a grant of rights in streets "which to the extent that they were accepted and availed of by any company, constitute a franchise granted by the State and accepted by the company" (p. 119); and again: "To the extent that the offer of the state contained in the section was accepted by a telegraph company by the actual occupation of a highway prior to any appeal, modification or suspension of the section, no right of revocation having be reserved, such telegraph company has vested rights that cannot be taken away by the state or city without compensation" (p. 120); and further: "So far as any company had not at such time availed itself of and thus accepted the provisions of section 536, there was no 'existing' grant or franchise to be annulled, and there was never any 'special' or 'exclusive' privilege given by the section." (P. 123.) The part of the decision last quoted relates directly to the question whether the telegraph company, un-
69 der the general legislative grant to all companies in any street, acquired any right in the streets in which it had not erected poles or strung wires prior to a repeal of the section, which such repeal would divest. It is practically the same question as that presented here and is authority for the proposition that the gas company had no vested rights in streets not previously used for the laying of gas mains. To the same effect are St. Louis v. W. U. T. Co., 149 U. S. 465; Northwest etc. Co. v. St. Charles, 154 Fed. 388, and Muscogee etc. Co. v. Hall, 64 S. W. 603. There are cases involving grants of franchises in streets of a particular city to a particular person or corporation, which hold that a right vests in all streets as soon as the franchise is accepted, and that such acceptance may be manifested either by a formal written acceptance or by the actual exercise of the rights granted thereby. We do not consider these decisions authority upon the question here involved. The distinc-

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tion between such a special grant of a described right and the general offer here involved is obvious.

For these reasons we are of the opinion that Economic Gas Company had no vested right to excavate in the new street or to lay pipes therein to extend its service into new territory within the city.

The petitioner is remanded to the custody of the chief of police of the city of Los Angeles.

SHAW, *J.*

We concur:

ANGELLOTTI, *J.*
SLOSS, *J.*
LORIGAN, *J.*
HENSHAW, *J.*

70 In Bank.

Crim. No. 1733.

In re RUSSELL.

By the COURT:

Rehearing Denied. October 11th, 1912.

Beatty, C. J., Dissenting.

Filed October 11th, 1912. B. Grant Taylor, Clerk, By A. S. Ramage, Deputy.

71 In the Supreme Court of the State of California.

ROBERT RUSSELL, Plaintiff in Error,
vs.
CHARLES E. SEBASTIAN, as Chief of Police of the City of Los Angeles, State of California, Defendant in Error.

Petition for Writ of Error to the Supreme Court of the United States.

In the Matter of the Application of ROBERT RUSSELL for Writ of Habeas Corpus.

To the Honorable William H. Beatty, Chief Justice of the Supreme Court of the State of California:

Now comes Robert Russell, plaintiff in error herein, and says:

That on or about the 13th day of September, 1912, said court rendered an opinion herein, in which opinion the court decided that the said petitioner was not entitled to be discharged upon his writ of habeas corpus, and thereafter, and within the time allowed by law, the petitioner filed a petition for rehearing of said case; that said petition for rehearing was denied by said court, and thereafter, at the expiration of thirty days from said September 13, 1912, said court rendered judgment in accordance with said opinion, and said judgment thereupon became final, and said Robert Russell was by

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said judgment remanded to the custody of said defendant in error, from whose custody he had been taken by writ of habeas corpus in said matter;

That in said judgment and the proceedings had prior thereunto in this cause, certain errors were committed, to the prejudice
72 of this plaintiff in error, all of which will more in detail appear from the assignment of errors which is filed with this petition and made a part hereof.

The said final judgment in said matter was and is rendered in the highest court of said state of California in which a decision in said suit could be had; or wherein could be drawn in question the validity of the said ordinances of the city of Los Angeles, and the authority exercised by the city of Los Angeles under said state, on the ground of their being repugnant to the constitution and laws of the United States, and where the title, right and privilege or immunity claimed in said matter under the constitution of the United States could be set up or claimed; said decision is against the title, right, privilege and immunity specially set up and claimed by said plaintiff in error under said constitution of the United States.

Wherefore, this plaintiff in error prays that a writ of error may issue in this behalf to the Supreme Court of the United States of America for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

OSCAR A. TRIPPET &
TRIPPET, CHAPMAN & BIBY,
Att'ys for Petitioner and Plaintiff in Error.

73 [Endorsed:] (Copy.) In the Supreme Court of the State of California. Robert Russell, Plaintiff in Error, vs. Charles E. Sebastian, etc., Defendant in error. Petition for Writ of Error to the Supreme Court of the United States. Filed Dec. 18 1912. B. Grant Taylor, Clerk, By —— ——, Deputy. Oscar A. Trippet & Trippet, Chapman & Biby, 321 B. F. Coulter Building, 213 S. Broadway, Los Angeles, Cal., Attorneys for Pl'tiff in Error.

74 In the Supreme Court of the State of California.

ROBERT RUSSELL, *Plaintiff in Error,*
vs.
CHARLES E. SEBASTIAN, as Chief of Police of the City of Los Angeles, State of California, Defendant in Error.

In the Matter of the Application of ROBERT RUSSELL for Writ of Habeas Corpus in said Court.

Assignment of Errors.

Comes now the plaintiff in error above named, and in connection with his petition for writ of error here now makes the following as-

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signment of errors, which he avers occurred upon the trial of the said cause, to wit:

First. The said Supreme Court of the State of California erred in its opinion in said cause and the judgment rendered therein in remanding said plaintiff in error to the custody of the defendant in error.

Second. Said court erred in not discharging the said plaintiff in error from the custody of the said defendant in error.

Third. The court erred in deciding that the amendment to the constitution of the state of California which went into effect October 10, 1911, was valid as against the claims of the Economic Gas Company set forth in said matter.

Fourth. That the court erred in holding that said constitutional amendment which went into effect October 10, 1911, did not grant to the Economic Gas Company a franchise to lay its gas mains in the streets of the city of Los Angeles.

75 Fifth. The court erred in holding that the said Economic Gas Company did not have a franchise under the constitution of the state of California known as Article XI, Section 19 of the said constitution of the state of California as the same existed prior to the amendment of the constitution of October 10, 1911, to lay its gas pipes and mains in the streets of the city of Los Angeles.

Sixth. Said court erred in holding and deciding that the said Economic Gas Company did not have a contract with the city of Los Angeles under said Section 19, Article XI of the constitution of the state of California, which entitled the said Economic Gas Company to lay its gas pipes and mains in the streets of the city of Los Angeles.

Seventh. The court erred in deciding that the provisions of the city charter of the city of Los Angeles and proceedings of the council as set forth in the petition for writ of habeas corpus in said matter, and as shown by the exhibits to said petition, do not abridge the privileges and immunities of the petitioner in error and deprive the said Economic Gas Company of the equal protection of the laws.

Eighth. The court erred in deciding that the exhibits attached to the petition for writ of habeas corpus herein, namely, the ordinances of said city of Los Angeles, did not contravene the clause of Section 10, Article XI, of the constitution of the United States, which forbids any state to pass a law impairing the obligation of contracts, or those provisions of the fourteenth amendment to said constitution which forbid a state to deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

Ninth. The court erred in deciding that the constitutional change of October 10, 1911, affected the rights of the Economic Gas Company.

76 Tenth. The court erred in deciding that the ordinance under which petitioner was arrested was valid, and in deciding that its enforcement would not impair the obligation of the contract between the state of California and the Economic Gas Company, contrary to the provisions of the federal constitution.

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Eleventh. The court erred in not deciding that the enforcement of the ordinance set forth in the petition for writ of habeas corpus herein would deprive the Economic Gas Company of its property and its rights already vested on October 10, 1911, and that this vested right included the right and power to extend its distributing system, without which the work already constructed would be a loss.

Twelfth. The court erred in not deciding that the Economic Gas Company has a constitutional right to proceed with its work under the amendment of 1911 of the Constitution of the State of California, and that the purchase of a franchise is not a condition precedent therefor.

Thirteenth. The court erred in deciding that the Economic Gas Company did not have a contract with the state of California by which it had a right to extend its gas mains in the streets of the city of Los Angeles.

Fourteenth. The court erred in not deciding that the amendment to the Constitution of the State of California and the ordinances of the city of Los Angeels were contrary to the provisions of Section 10 of Article XI of the Constitution of the United States, which prohibits any state from passing a law impairing the obligation of a contract.

77 Wherefore, the said plaintiff in error prays that the judgment of the said court be reversed, and such direction be given that full force and efficacy may inure to the plaintiff in error by reason of his said rights set forth in the records of said cause.

OSCAR A. TRIPPET &
TRIPPET, CHAPMAN & BIBY,
Att'ys for Plaintiff in Error.

78 [Endorsed:] (Copy.) In the Supreme Court of the State of California. Robert Russell, Plaintiff in Error, vs. Charles E. Sebastian, etc., Defendant in Error. Assignment of Errors. Filed Dec. 18, 1912. B. Grant Taylor, Clerk. By —— ——, Deputy. Oscar A. Trippet & Trippet, Chapman & Biby, 321 B. F. Coulter Building, 213 S. Broadway, Los Angeles, Cal., Attorneys for Pl't'ff in Error.

79 In the Supreme Court of the State of California.

ROBERT RUSSELL, Plaintiff in Error,
vs.
CHARLES E. SEBASTIAN, as Chief of Police of the City of Los Angeles, State of California, Defendant in Error.

Order Allowing Writ of Error.

In the Matter of the Application of ROBERT RUSSELL for Writ of Habeas Corpus.

Upon motion of Oscar A. Trippet, attorney for plaintiff in error, and upon filing a petition for a writ of error and an assignment of errors,

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It is ordered: That a writ of error be, and hereby is, allowed, to have reviewed in the Supreme Court of the United States of America a judgment heretofore entered herein, and that the bond on said writ of error heretofore fixed at the sum of $500.00 is hereby approved.

Dated this 17th day of December 1912.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

80 [Endorsed:] (Copy.) In the Supreme Court of the State of California. Robert Russell, Plaintiff in Error, vs. Charles E. Sebastian, etc., Defendant in Error. Order Allowing Writ of Error. Filed Dec. 18 1912. B. Grant Taylor, Clerk, By —— ——, Deputy. Oscar A. Trippet & Trippet, Chapman & Biby, 321 B. F. Coulter Building, 213 S. Broadway, Los Angeles, Cal., Attorneys for Pl'tiff in Error.

81 In the Supreme Court of the State of California.

ROBERT RUSSELL, Plaintiff in Error,
vs.
CHARLES E. SEBASTIAN, as Chief of Police of the City of Los Angeles, State of California, Defendant in Error.

Writ of Error.

In the Matter of the Application of ROBERT RUSSELL for Writ of Habeas Corpus.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of California, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the state of California before you, or some of you, being the highest court of law or equity of the said state, in which a decision — made by it, in that certain suit wherein Robert Russell was the petitioner for a writ of habeas corpus to be issued to the defendant in error herein, Charles E. Sebastian, wherein was drawn in question the validity of statutes of the state of California and ordinances of the city of Los Angeles, California, on the ground of their being repugnant to the constitution and treaties and laws of the United States, and the decision — in favor of the validity of said statutes and ordinances; and wherein was drawn in question the construction of a clause of the constitution of the United States, and the decision was against
82 the right, title, privilege or exemption especially set up or claimed under such clause of the constitution and treaty, *and* manifest error hath happened to the great damage of the said Robert Russell, the plaintiff in error, as by his complaint appears, we being

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willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 8th day of February (1913) next, in the said Supreme Court, to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and customs of the United States should have been done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 11th day of December, 1912.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk of the United States District Court,
Northern District of California.
By —— ——, *Deputy Clerk.*

Allowed by W. H. Beatty Chief Justice Supreme Court of the State of California.

I hereby certify that a copy of the foregoing writ of error was on the 11th day of December 1912, lodged in the Clerk's Office of the said Supreme Court of the State of California for the said plaintiff in error.

B. GRANT TAYLOR,
Clerk of the Supreme Court,
of the State of California.
By I. ERB, *Deputy.*

83 [Endorsed:] (Original.) In the Supreme Court of the State of California. Robert Russell, Plaintiff in Error, vs. Charles E. Sebastian, etc., Defendant in Error. Writ of Error. Filed Dec. 18, 1912. B. Grant Taylor, Clerk. By Erb, Deputy. Oscar A. Trippet & Trippet, Chapman & Biby, 321 B. F. Coulter Building, 213 S. Broadway, Los Angeles, Cal., attorneys for Pl't'ff in Error.

84 In the Supreme Court of the State of California.

ROBERT RUSSELL, Plaintiff in Error,
vs.
CHARLES E. SEBASTIAN, as Chief of Police of the City of Los Angeles, State of California, Defendant in Error.

In the Matter of the Application of ROBERT RUSSELL for Writ of Habeas Corpus.

Citation.

To Charles E. Sebastian, Defendant in Error in the above entitled Cause:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the city of Washington, in the District of Columbia, on the 8th day of February, 1913, pursuant to writ of error filed in the clerk's office of the Supreme Court of the State of California, wherein Robert Russell is plaintiff in error in said action and you are defendant in error in said action, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, Chief Justice of the Supreme Court of the State of California, this 12th day of December, 1912, and the independence of the United States the one hundred and thirty-seventh.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

85 Due service of the within citation and receipt of copy of writ of error mentioned therein this day admitted, and a copy of the same served upon us at Los Angeles city, California, this 14th day of December, 1912.

JOHN W. SHENK,
Los Angeles City Attorney;
RAY E. TIMMS,
Los Angeles Prosecuting Att'y,
Att'ys for Def't in Error.

____ ____,
Def't in Error.

86 [Endorsed:] (Original.) In the Supreme Court of the State of California. Robert Russell, Plaintiff in Error, vs. Charles E. Sebastian, Etc., Defendant in Error. Citation. Filed Dec. 18, 1912. B. Grant Taylor, Clerk. By Erb, Deputy. Oscar A. Trippet & Trippet, Chapman & Bilby, 321 B. F. Coulter Building, 213 S. Broadway, Los Angeles, Cal., attorneys for Pl't'ff in Error.

87 In the Supreme Court of the State of California.

ROBERT RUSSELL, Plaintiff in Error,
vs.
CHARLES E. SEBASTIAN, as Chief of Police of the City of Los Angeles, State of California, Defendant in Error.

In the Matter of the Application of ROBERT RUSSELL for Writ of Habeas Corpus.

Order Fixing Bond.

The plaintiff in error having this day filed his petition for a writ of error from the decision and judgment thereunder made and entered herein to the Supreme Court of the United States of America, together with an assignment of errors, within due time, and also praying that an order be made fixing the amount of security which said plaintiff in error should give and furnish on said writ of error being granted, and said petition having this day been duly allowed:

Now therefore, it is ordered:

That the plaintiff in error, Robert Russell, file with the clerk of this court a good and sufficient bond in the sum of $500.00 to the effect that if the said plaintiff in error shall prosecute the said writ of error to effect and if he fails to make his plea good, shall answer all costs, then said obligation to be void; else to remain in full force and virtue; the said bond to be approved by this court.

Dated this 9th day of December 1912.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

88 [Endorsed:] (Copy.) In the Supreme Court of the State of California. Robert Russell, Plaintiff in Error, vs. Charles E. Sebastian, etc., Defendant in Error. Order Fixing Bond. Filed Dec. 18, 1912. B. Grant Taylor, Clerk. By —— —— Deputy. Oscar A. Trippet & Trippet, Chapman & Biby, 321 B. F. Coulter Building, 213 S. Broadway, Los Angeles, Cal., attorneys for Pl't'ff in Error.

89 In the Supreme Court of the State of California.

ROBERT RUSSELL, Plaintiff in Error,
vs.
CHARLES E. SEBASTIAN, as Chief of Police of the City of Los Angeles, State of California, Defendant in Error.

In the Matter of the Application of ROBERT RUSSELL for Writ of Habeas Corpus.

Bond for Writ of Error.

Know all men by these presents: That we, Robert Russell, as principal, and L. P. Lowe as surety, are held and firmly bound unto the defendant in error above named, in the sum of $500.00 to be paid to the said defendant in error, his executors or administrators, to which payment well and truly to be made we bind ourselves, our, and each of our heirs, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 29th day of November 1912.

Whereas, the above named plaintiff in error has sued out a writ of error to the Supreme Court of the United States of America to reverse the judgment in the above entitled cause, rendered by the Supreme Court of the State of California;

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute said writ to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full

90 force and virtue.

ROBERT RUSSELL. [SEAL.]
L. P. LOWE. [SEAL.]

STATE OF CALIFORNIA,
City & County of San Francisco, ss:

L. P. Lowe, the surety whose name is subscribed to the above undertaking, being duly sworn says that he is a resident and householder in the said city, county and state, and is worth the sum in said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

(Signed) L. P. LOWE.

Subscribed and sworn to before me this 10th day of December, 1912.

[SEAL.] L. H. ANDERSON,
Notary Public in and for the City and County of San Francisco, State of California.

This bond is approved this 17th day of Dec'r, 1912.

W. H. BEATTY, *C. J.*

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91 [Endorsed:] (Copy.) In the Supreme Court of the State of California. Robert Russell, Plaintiff in Error, vs. Charles E. Sebastian, etc., Defendant in Error. Bond for Writ of Error. Filed Dec. 18, 1912. B. Grant Taylor, Clerk. By —— ——, Deputy. Oscar A. Trippet & Trippet, Chapman & Biby, 321 B. F. Coulter Building, 213 S. Broadway, Los Angeles, Cal., attorneys for Pl't'ff in Error.

92 In the Supreme Court of the State of California.

Crim. 1733.

ROBERT RUSSELL, Plaintiff in Error,
v.
CHARLES E. SEBASTIAN, as Chief of Police of the City of Los Angeles, State of California, Defendant in Error.

In the Matter of the Application of ROBERT RUSSELL for Writ of Habeas Corpus.

Certificate of Clerk.

STATE OF CALIFORNIA, *ss:*

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, hereby certify that I have compared the foregoing copies of petition for writ of habeas corpus, return to writ, order of submission, opinion, denial of rehearing, petition for writ of error, assignment of errors, order allowing writ of error, writ of error, order fixing bond, bond for writ of error, and said copies, together with the original writ of error and original citation constitute the papers on appeal to the Supreme Court of the United States of America from the Supreme Court of the State of California.

In witness whereof, I have hereunto set my hand and the seal of the court this 18th day of December, A. D. 1912.

[Seal Supreme Court of California.]

B. GRANT TAYLOR,
By I. ERB *Deputy.*

Endorsed on cover: File No. 23,488. California Supreme Court. Term No. 913. Robert Russell, plaintiff in error, vs. Charles E. Sebastian. Filed January 7, 1913. File No. 23,488.

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Office Supreme Court, U. S.
FILED.
JUN 27 1913
JAMES H. McKENNEY,
CLERK.

415.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1912

No. 912.

Robert Russell,
Plaintiff in Error,
vs.
Charles E. Sebastian,
Defendant in Error.

MOTION TO ADVANCE CAUSE.

OSCAR A. TRIPPET,
Attorney for Plaintiff in Error.
JOHN W. SHENK,
RAY E. NIMMO,
Attorneys for Defendant in Error and for the City of Los Angeles.

Parker & Stone Co., Law Printers, Los Angeles, Cal.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1912.

Robert Russell, *Plaintiff in Error,* *vs.* **Charles E. Sebastian,** *Defendant in Error.*	No. 913.

MOTION TO ADVANCE CAUSE.

Come now the plaintiff in error and the defendant in error and move said Honorable Court to advance said cause, under subdivision 3 of rule 26 of this court, and under Sec. 253 of the Judiciary Act.

The parties request that said cause be assigned for hearing and be heard as near the beginning of the October term, 1913, as the court can conveniently hear the same.

The stipulation hereto attached and hereof made a part contains a brief statement of the matter involved, with the reasons for this application.

OSCAR A. TRIPPET,
Attorney for Plaintiff in Error.
JOHN W. SHENK,
RAY E. NIMMO,
Attorneys for Defendant in Error.

In the Supreme Court of the United States.

Robert Russell, plaintiff in error, vs. Charles E. Sebastian, defendant in error.

No. 913. October term, 1912.

STIPULATION.

It is hereby stipulated between the plaintiff in error and the defendant in error that the above entitled cause arose on a petition for a writ of habeas corpus, filed in the Supreme Court of the state of California, by the plaintiff in error.

Said petition shows that the plaintiff in error was working for a corporation known as the Economic Gas Company; that as an employee of said company he was, on the 27th day of February, 1912, engaged in making an excavation in the streets of the city of Los Angeles, for the purposes of laying gas pipes; that the said company claimed at that time that said company had a franchise granted to it by the state of California through its constitution of 1879, as

amended in 1885, being section 19 of article XI of said constitution; that said company claimed that it had complied with the provisions of the said constitution and with the laws of the state adopted in pursuance of the said constitution and with the ordinances of said city adopted in pursuance thereof.

That subsequently, on October 10, 1911, the said section 19 of Article XI was amended. The plaintiff in error claims that said amendment of said section of the constitution did not revoke or cancel the franchise claimed to have been granted by the said section of the constitution.

The defendant in error contends that the offer of franchise rights contained in section 19 of article XI of the constitution of the state of California prior to its amendment on October 10, 1911, was revoked by said amendment of October 10, 1911, and that the rights of the Economic Gas Company acquired under said section of the constitution prior to its amendment were, and are, confined to the streets in which the gas mains of said company were actually laid prior to said amendment, and that the said company did not, under the provisions of the charter of the city of Los Angeles, obtain a franchise from said city to authorize it to occupy and use the public streets not occupied by such mains prior to said amendment, for the extension and operation of its gas mains therein.

The plaintiff in error also contended in said petition that by the section of the constitution of the state of California as amended October 10, 1911, the said company was granted a franchise to occupy said streets, and the city claims that no such franchise was so granted.

The plaintiff in error was arrested on said 27th day of February, 1912, and held in confinement until released on bail upon the issuance of a writ of habeas corpus; that the Supreme Court of the state of California, after hearing, dismissed the writ and remanded the plaintiff in error to the custody of the defendant in error, the chief of police of the city of Los Angeles, and thereupon the said plaintiff in error brought his case to this court on petition of writ of error granted by the chief justice of the Supreme Court of the state of California.

That said plaintiff in error is at liberty upon bond pending the hearing of his petition for a writ of error.

That the parties hereto further stipulate that the questions involved in this cause are of great importance to the city of Los Angeles and to the state of California; that these questions affect the rights of all water and gas companies in the state of California to extend their mains on streets unoccupied on October 10, 1911; that the city officials of the city of Los Angeles and of other cities in the state of California are in-

sisting that water and gas companies obtain franchises from the city authorities to occupy and use the public streets not occupied prior to October 10, 1911; that the officers of water and gas companies are uncertain as to their rights to extend their systems on streets unoccupied on October 10, 1911, until this question is finally determined by this court; that the plaintiff in error claims that the constitution of the United States has been violated by the amendment of October 10, 1911, to the constitution of the state of California, and by the action of the city authorities thereunder in refusing to permit the occupancy of streets not occupied October 10, 1911, without franchises, and that by reason of this the rights of the Economic Gas Company have been violated.

The parties to this proceeding hereby further stipulate and urge that the questions involved should be immediately decided for public convenience, and that this cause should be advanced upon the calendar of this court for the reason hereinbefore set forth; that complications are daily arising, and the necessity of a determination of the questions involved is daily growing greater by reason of the uncertainty of the rights of municipalities in California and of gas and water companies under the constitution of California.

Wherefore, the respective parties to this proceeding hereby petition this court to advance said cause, and do now petition said court to advance said cause upon the docket, that the same may be heard at as early a date as possible.

OSCAR A. TRIPPET,
Attorney for Plaintiff in Error.
JOHN W. SHENK,
RAY E. NIMMO,
Attorneys for Defendant in Error and for the City of Los Angeles.

Office Supreme Court, U. S.
FILED
DEC 8 1913
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1913.

[redacted]

Robert Russell,
Plaintiff in Error,
vs.
Charles E. Sebastian,
Defendant in Error.

No. 415.

Brief and Argument for Plaintiff in Error.

OSCAR A. TRIPPET,
H. H. TROWBRIDGE,
TRIPPET, CHAPMAN & BIBY,
Attorneys for Plaintiff in Error.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1913.

No. 413.

Robert Russell,
Plaintiff in Error,
vs.
Charles E. Sebastian,
Defendant in Error.

Brief and Argument for Plaintiff in Error.

I.

STATEMENT OF THE CASE.

This is an application for a writ of habeas corpus.

The application shows that the Economic Gas Company was incorporated May, 1909, for the purpose of supplying gas light to the inhabitants of the city of Los Angeles under and in accordance with the provisions of section 19, article XI of the California Constitution as it existed prior to October 10, 1911.

That the city of Los Angeles has not now, and did not have at any time mentioned in the petition, any public works for supplying said city with gas light.

That the streets of the city are under the control of the department of public works, known as the board of public works.

The application sets forth all the provisions of the charter of the city of Los Angeles relative to the control of the streets and that affect the right of the Economic Gas Company to maintain a gas plant in said city.

Section 19 of article XI of the Constitution as amended in 1885, and as it existed at the time the Economic Gas Company accepted the franchise granted thereby, and began the construction of its gas plant, read as follows:

> "In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supply-

ing such city and its inhabitants either with gas light, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

By amendment adopted by the people of the state of California, October 10, 1911, this section of the Constitution was amended to read as follows:

"Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

The application sets forth that the Economic Gas Company acquired a part of its plant in June, 1909, and immediately commenced to ex-

tend and rebuild the plant so acquired; that the plant that it acquired had been constructed in pursuance of the Constitution as it existed prior to October 10, 1911, and that the Economic Gas Company continued to construct its system under the Constitution as it existed prior to said date.

At the time it was incorporated and acquired such system, the said Economic Gas Company designed and intended, and ever since has designed and intended, to extend the said distributing system and to supply the said city of Los Angeles and its inhabitants with gas light in every section of said city and to every inhabitant thereof who desired to, or would, take gas from said Economic Gas Company, and the company has, ever since its incorporation, diligently prosecuted the work of constructing its system.

That this construction of the Economic Gas Company was made with a view of complying with this intention and design and of supplying a much larger territory and a great many more inhabitants of the city of Los Angeles than it was so supplying on October 10, 1911. That said plant is far more expensive and contains a very much greater capacity than is necessary to supply the occupants of abutting or contiguous property to the streets in which its street mains and conduits were so laid on October 10, 1911, and is sufficient to supply many more inhabitants

of the city of Los Angeles than it was supplying upon that date. That by reason of said construction being so originally made with the design and intention of supplying a larger territory and many more inhabitants than it was supplying on said date, the expense of constructing the same was far greater, to-wit, more than $100,000 greater than would have been necessary if the said system had been intended to be limited to the territory so served on said date, and to supplying the inhabitants, so supplied on said date in said territory. That by reason of such increased expense in said construction as aforesaid, the Economic Gas Company cannot supply the territory contiguous to the streets occupied on said date and the inhabitants of said territory at a profit, but to supply only such limited territory and the inhabitants thereof with gas light would entail upon said company a constant loss of more than $2000 per month.

That in order that the Economic Gas Company supply the city of Los Angeles and the inhabitants thereof with gas light at a profit, it is necessary that the original design should be carried out and that the company's mains and conduits be extended to a larger portion of said city and more inhabitants be served.

The Economic Gas Company applied to the proper authorities for permission to extend its system, and showed these authorities that de-

mands had been made upon said company, under the codes of the state of California, to extend its system, and the petition for the writ alleges that unless the company is permitted to extend its system, it cannot comply with the provisions of the law, and is liable to be mulcted in damages for failure to extend its system in compliance with the demands of the inhabitants of the city.

The city refuses to permit the company to extend its system under the provisions of the Constitution as above set forth. The Economic Gas Company asserts the right to extend its system, claiming in this regard the following:

1. That by the construction of its generating plant and occupation of certain of the streets of Los Angeles the company had accepted the constitutional offer of a right to use the public streets for a general distributing system throughout the city.

2. That no constitutional change can now deprive the company of the right to so extend its system, because so to do would (a) impair the obligation of a contract so created; and (b) would impair the value of the construction already completed.

The Supreme Court of California decided these questions against petitioner and the case is here on writ of error.

II.

Errors Assigned and Relied Upon.

First: The said Supreme Court of the state of California erred in its opinion in said cause and the judgment rendered therein in remanding said plaintiff in error to the custody of the defendant in error.

Second: Said court erred in not discharging the said plaintiff in error from the custody of the said defendant in error.

Third: The court erred in deciding that the amendment to the Constitution of the state of California which went into effect October 10, 1911, was valid as against the claims of the Economic Gas Company set forth in said matter.

Fifth: The court erred in holding that the said Economic Gas Company did not have a franchise under the Constitution of the state of California known as article XI, section 19 of the said Constitution of the state of California as the same existed prior to the amendment of the Constitution of October 10, 1911, to lay its gas pipes and mains in the streets of the city of Los Angeles.

Sixth: Said court erred in holding and deciding that the said Economic Gas Company did not have a contract with the city of Los Angeles under said section 19, article XI of the Constitution of the state of California, which entitled

the said Economic Gas Company to lay its gas pipes and mains in the streets of the city of Los Angeles.

Seventh: The court erred in deciding that the provisions of the city charter of the city of Los Angeles and proceedings of the council as set forth in the petition for writ of habeas corpus in said matter, and as shown by the exhibits to said petition, do not abridge the privileges and immunities of the petitioner in error and deprive the said Economic Gas Company of the equal protection of the laws.

Eighth: The court erred in deciding that the exhibits attached to the petition for writ of habeas corpus herein, namely, the ordinances of said city of Los Angeles, did not contravene the clause of section 10, article XI of the Constitution of the United States, which forbids any state to pass a law impairing the obligation of contracts, or those provisions of the fourteenth amendment to said Constitution which forbid a state to deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

Ninth: The court erred in deciding that the constitutional change of October 10, 1911, affected the rights of the Economic Gas Company.

Tenth: The court erred in deciding that the ordinance under which petitioner was arrested

was valid, and in deciding that its enforcement would not impair the obligation of the contract between the state of California and the Economic Gas Company, contrary to the provisions of the federal Constitution.

Eleventh: The court erred in not deciding that the enforcement of the ordinance set forth in the petition for writ of habeas corpus herein would deprive the Economic Gas Company of its property and its rights already vested on October 10, 1911, and that this vested right included the right and power to extend its distributing system, without which the work already constructed would be a loss.

Twelfth: The court erred in not deciding that the Economic Gas Company has a constitutional right to proceed with its work under the amendment of 1911 of the Constitution of the state of California, and that the purchase of a franchise is not a condition precedent therefor.

Thirteenth: The court erred in deciding that the Economic Gas Company did not have a contract with the state of California by which it had a right to extend its gas mains in the streets of the city of Los Angeles.

Fourteenth: The court erred in not deciding that the amendment to the Constitution of the state of California and the ordinances of the city of Los Angeles were contrary to the provisions of section 10 of article XI of the Constitution of

the United States, which prohibits any state from passing a law impairing the obligation of a contract.

POINTS OF LAW.

III.

The Assignment of Error Presents Questions Which this Court is Bound to Decide for Itself, Independent of Decisions of the State Court.

Grand Trunk W. R. Co. v. South Bend, 227 U. S. 544.

IV.

The Constitutionality of an Ordinance of a City May be Tested Upon an Application for a Writ of Habeas Corpus.

Ex Parte Johnson, 137 Cal. 115.

V.

Section 19 of Article XI of the Constitution of the State of California is a Grant of a Franchise to Any Gas Company that Accepted the Same Prior to the Amendment Thereof, and Such Grant and the Acceptance Constituted a Contract Between the People of the State and Such Gas Company, Which Could Not be Impaired by Any Change in the Provisions of the Constitution.

People v. Stephens, 62 Cal. 209;
Pereria v. Wallace, 129 Cal. 397;

Mercantile Trust Co. v. Denver, 161 Fed. 769;

People v. Deehan, 153 N. Y. 528, 47 N. E. R. 787;

Welsh v. Bramlet, 98 Cal. 219, 224;

McDonald v. Patterson, 54 Cal. 245, 247;

Western Union Tel. & T. Co. v. Hopkins, 116 Pac. 557;

Ex Parte Johnson, 137 Cal. 115;

Stockton Gas & Electric Co. v. San Joaquin Co., 148 Cal. 314;

Denninger v. Recorder's Court, 145 Cal. 629;

Bank of Cal. v. San Francisco, 142 Cal. 276;

San Jose Gas Co. v. January, 57 Cal. 614;

People v. Lawley, 13 Cal. App. 459; *id.* 646 (Advance Sheets; decided Oct. 10, 1911);

Nevada Bank v. Steinmitz, 64 Cal. 301;

Workman v. So. Pac., 129 Cal. 536;

Merced Falls Co. v. Turner, 2 Cal. App. 720;

So. Pacific v. Portland, 177 Fed. 958;

Cable S. R. Co. v. Citizens, 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893;

Stanislaus Co. v. San Joaquin Canal & Irr. Co., 192 U. S. 201, 206;

Hovelman v. Kansas Cy. Ry. Co., 79 Mo. 639;

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Rutland Elec. L. Co. v. Marble Cy. etc. Co., 26 Atl. 635;

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Boise Artesian H. & C. Water Co. v. Boise City, 230 U. S. 84;

Pearsall v. Great Northern Ry., 161 U. S. 646;

Capitol Cy. v. Tallahassee, 186 U. S. 401;

Detroit v. Detroit, 43 Mich. 140, 5 N. W. 275;

Elliott on Roads & Streets, sec. 759 (2nd Ed.);

Grand Trunk W. R. Co. v. South Bend, 227 U. S. 544.

The provisions of section 19, article XI of the Constitution of the state of California expressly granted to any individual or company incorporated for the purpose of supplying municipalities with water or artificial light, subject to the directions of the superintendent of streets or other officials in control thereof and under such general regulations as the municipality may prescribe for damages and indemnity for damages, the privilege of using the public streets and thor-

oughfares of any city (where there are no public works owned and controlled by the municipality) so far as may be necessary for introducing into and supplying said city and the inhabitants thereof with gas and other illuminating light, or with water.

In addition to the provisions of the Constitution above referred to, section 19 of article XI of the Constitution of 1879 as originally adopted, contained this sentence:

> "No public work or improvement of any description whatsoever shall be done or made, in any city, in, upon, or about the streets thereof, or otherwise, the cost and expense of which is made chargeable or may be assessed upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment in proportion to benefits on the property to be affected or benefited shall be levied, collected, and paid into the city treasury before such work or improvement shall be commenced, or any contract for letting or doing the same authorized or performed."

In construing this provision of the Constitution, the California Supreme Court, in McDonald v. Patterson, 54 Cal. 245, 247, said:

> "In the construction of this Constitution, the rule expressed in section 22, article I, must always be regarded. That section declares that 'the provisions of this Constitution are mandatory and prohibitory, unless

> by express words they are declared to be otherwise.' * * *
>
> "The language of section 19 of article XI, is both mandatory and prohibitory in its character. It is clear and unambiguous. It is difficult to see that it could have been made stronger in its words of command and prohibition. What words more vigorous or more appropriate to their manifest purpose could have been found in the whole compass of the English tongue, we are at a loss to determine. It says, as plainly as words can disclose: 'We command that no such work as that referred to shall at any time be done, except as herein set down; and we prohibit any such work from being done at any time in any other way.' It is mandatory and prohibitory to every department of the government, and every officer of each department. By its very terms it is binding upon all, and goes into effect as soon as the Constitution becomes the organic law, as it is strongly prohibitory. We could not hold otherwise, without disregarding the plain meaning of words, and the rule laid down for its interpretation in the 22nd section of the 1st article."

There is no reason that the same construction should not be placed upon the remaining portion of section 19, as in force in this state until October 10, 1911.

The provisions of the Constitution under consideration therefore are both mandatory and prohibitory; they command the municipal authorities to permit the use of the streets for the purpose of supplying the city and its inhabi-

tants (which must mean all the inhabitants) with gas light or other illuminating light. They prohibit the public authorities from interfering with such individual or corporation so engaged in the use of the streets for those purposes.

This provision of the Constitution as it now stands received a liberal and practical common sense construction in the case of People v. Stephens, 62 Cal. 209.

This was a suit brought by the attorney general to enjoin the defendants from using the streets of the town of Woodland, in the county of Yolo, in California, for the purpose of laying down water pipes intending to supply the inhabitants of the town with pure fresh water. Previous to that time, certain concessions had been made to one Peek, the proprietor of the then existing water works in said town, purporting to grant to him an exclusive right to the use of certain streets in the town for the purpose of laying pipes and supplying certain portions of the town with water. On the 10th of October, 1879, the defendants in that case, desirous of laying down pipes in all the public streets and alleys and supplying the town and its inhabitants with water, presented to the board of trustees of the town a memorial and draft of ordinance granting that right to the defendants, which memorial and ordinance were rejected. Thereupon the defendants presented to the board

of trustees and asked the adoption of an ordinance granting to them the right to lay down pipes and take water through the streets for their individual use. This was also denied. On the 17th day of October, 1879, the defendants asked of the board of trustees the right to lay down and maintain pipes and to sell water in that portion of the town wherein no exclusive right had been granted to Peek, but the trustees again refused to grant their request. On the 16th day of January, 1880, a petition was presented by the defendants to the board of trustees, suggesting that they, the defendants, were ready to proceed to use the public streets in laying down water pipes and requesting the board to adopt proper regulations for the use of the streets for persons and corporations supplying the town and its inhabitants with water. This the board did and adopted an ordinance to that effect on the 2nd day of February, 1880, but on the 27th day of March, 1880, the board repealed this ordinance.

On the 14th day of March, 1880, the defendants served on the town marshal of the town, being the only superintendent of streets therein, a notice in writing that the defendant would commence excavating Main street at a point therein named in said town for the purpose of furnishing said town and its inhabitants with water on the 15th day of March, 1880, at the

hour of 9 o'clock a. m., at which time and place said marshal might be present and superintend the same. On the 15th day of March, 1880, the defendants, for the sole purpose of laying down water pipes in the streets and alleys of said town and furnishing an adequate supply of pure fresh water to said town and its inhabitants, pursuant to the last mentioned notice, commenced making the excavations in the streets and alleys of said town and continued to do so until the time of the commencement of said action.

By reference to the petition filed in this case, it will appear that a similar course was pursued by the employer of this applicant.

The application for an injunction in the case of the People v. Stephens, *supra*, having been denied and judgment having been rendered in favor of the defendants, an appeal was taken to the California Supreme Court and the judgment affirmed. It was contended on behalf of the people that the clause of the Constitution under consideration, under which the defendants claimed their authority to act, furnished no foundation for their claim and that the clause was not self-executing, but required legislation to enforce it. In the opinion filed in that case, after hearing by the California Supreme Court in bank, Mr. Justice Ross (now a judge of the

United States Circuit Court of Appeals), delivering the opinion of the court, in reply to this contention, said:

> "The gist of the very able argument of appellant's counsel is that, under the provisions of the present Constitution, no company or individual possesses the right to lay pipes in the streets of any incorporated city or town of the state for the purpose of supplying the inhabitants thereof with fresh water, until the legislature has prescribed the terms and conditions under which all this may be done.
>
> "*Prior to the adoption of the present Constitution, the legislature had that power. It could delegate to the municipal government, or itself exercise, the power of prescribing the terms and conditions upon which pipes might be laid and water furnished. The privileges lay only in grant from the legislature, which might be, and which experience showed had been, abused.* As with many others, in dealing with this subject, the framers of the Constitution of 1879, determined to, and did, make many radical changes from the pre-existing condition of things. * * * Now, these provisions, as well as all other provisions of the Constitution, must receive a practical common-sense construction. They must be considered with reference to the prior state of the law, *and with reference to the mischief intended to be remedied by the change.* If the framers of the instrument had intended to leave the entire matter where it previously rested—in the hands of the legislature—they would have said so in appropriate language. But it is perfectly evident that there were some things in regard to the subject that they

were unwilling to trust to the legislature. It was not with a view of 'liberating the great public uses of water and gas from legislative control, and making them independent of the state,' that the changes were made, but, on the contrary, it was intended, in certain enumerated respects, *to lay a stronger hand upon them than that of the legislature—to-wit, the hand of the Constitution itself.*" (Italics in this and other quotations are ours.)

The opinion then demonstrates that the failure of the legislature to enact and provide laws in reference to the establishment of rates or compensation for the use of water could not prevent the establishment of rates or compensation specifically required to be established by the Constitution, and then, in reference to section 19, article XI, the court said:

"And so with respect to the privilege granted by Sec. 19 of article XI of the Constitution of laying pipes in the public streets and thoroughfares of any city (where there are no public works owned and controlled by the municipality), so far as may be necessary for introducing into and supplying such city and its inhabitants with gas or other illuminating light or with fresh water. *The privilege is expressly granted by the section of the Constitution cited, subject to the direction of the superintendent of streets or other officer in control thereof,* and under such general regulation as the municipality may prescribe for damages and indemnity for damages, and upon the condition that the municipal government

shall have the right to regulate the charges thereof. The purpose of this provision was thus explained by the gentleman at whose instance it was inserted in, and became a part of the Constitution: 'It gives to any individual, as well as to any incorporated company, the right to the use of the streets for laying down pipes for the supply of gas and water, or either. I think that the objection, that was taken to the section as formerly introduced was well taken,—that it should not be limited to corporations; that any individual, for the public good, should have the right to use the streets for laying down pipes for supplying water or gas. It is in the public interest that it should be conceded, *and it prevents monopoly in any sense.* It also provides that the city authorities may make a regulation in relation to damages and indemnity; that is, that they may make a regulation requiring all work to be done under the supervision of the superintendent of streets, and also, if any damage should be likely to occur, they may, by security or otherwise, guard against it.' * * * Then it provides that the city and county shall have the right to regulate the price to be paid by the inhabitants for the gas and the water. This is also a necessary regulation, I think, against the abuses of monopoly. Now, in Los Angeles we have a gas company with a monopoly for twenty years, and several parties have endeavored to get the privilege for laying down pipes in the streets for the purposes of supplying the city and competing with this company, *but the company has always had sufficient influence in the municipal government to prevent this being done, and this company has a prospect of exclusive right for twenty*

years to come. Now, I submit to the convention that this is a great abuse of public authority and that it ought to be corrected. We have also there, a water company that claims the monopoly, and the private individual who did succeed in laying down pipes and is to some extent supplying the city with water in opposition to the monopoly, is threatened constantly with suits and injunctions, and if this thing goes on we will have a monopoly, not only of water and gas, but of all domestic necessaries, and then we will have some company peddling it by the tin cupful. It is time this abuse was corrected, and, therefore, I offer this amendment,—which 'amendment' is the clause of the Constitution now under consideration. (Debates Cons. Con., Vol. 2, p. 1075.)

"We have quoted at length the remarks accompanying the introduction of the provision, for the purpose of showing that the members of the constitutional convention had distinctly put before them the evils intended to be remedied, and the purpose of the enactment; and thus informed, they adopted it. Yet we are asked to hold, in effect, that after all, the whole matter rests where it did before—with the legislature. This we cannot do, nor, under our construction of the provisions in question, do we consided any indication of a return 'to the doctrine of the Dartmouth College case,' nor any fostering of monopolies, but, on the contrary, the most manifest intent to *prevent* them as respects the important subjects treated of—gas and water. By the adoption of those provisions the people asserted their unwillingness to leave the entire subject in the hands of the legislature, and in the particulars already indicated, de-

> clared the rule that should govern, in the organic law itself, and gave to the legislature the 'regulation and control' in other respects."

This question was again before the California Supreme Court in the case of Pereria v. Wallace, 129 Cal. 397, which was an appeal from an order of the Superior Court in Siskiyou county granting to the plaintiff there in a peremptory writ of mandamus against the defendants, the trustees of the town of Etna in Siskiyou county, requiring the defendants to grant to the plaintiff the same privileges as they had previously granted to the Etna Development Company, there being no ordinance of the town of Etna establishing general regulations for damages or indemnity for damages, but a privilege identical with that sought by the plaintiff having been granted to the Etna Development Company, and the plaintiff being willing to comply with the regulations imposed upon that company. It was contended in that case that after the passage of the act of the legislature of 1897 in relation to franchises and privileges of the character there in question, that the act contemplated the public sale of any and all privileges thereafter to be granted to any party, but it was further contended that that statute, so far as it relates to the franchise of supplying artificial light or water, is unconstitutional. The Supreme Court,

in its opinion, quotes at large section 19, article XI of the Constitution, and in reference to this section says:

> "Section 22 of article I provides that 'the provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.' The legislature, therefore, cannot modify or change the provisions of said section 19, article XI, above quoted, as to the privilege or franchise of supplying the town of Etna with artificial light. The Constitution intended that there should be no restriction upon competition in supplying these prime necessities, as would necessarily result if the privilege could only be granted to the highest bidder, for such bidder would necessarily secure an exclusive right to the franchise, the only condition imposed by the Constitution being the right of the municipality 'to regulate the charges thereof.'
>
> "It is true said section does not expressly name 'towns'; but the original section of the Constitution of 1879 used the same language in this regard as the amendment of 1883, and prior to said amendment it was held by this court that the language of said section included cities, towns, and cities and counties. (See People v. Stephens, 62 Cal. 209, 236, decided in 1882, prior to the amendment of that section of the Constitution, which amendment did not change its language in that regard.) Whether said Act of 1897 is valid in so far as it relates to street railroads, or other uses of streets necessarily exclusive in their nature, is not here involved, and no opinion is expressed. We think it clear, however, that under said provision of the Constitution the duty of

> the trustees to grant the franchise demanded by the plaintiff, subject only to the regulations and conditions therein imposed, is imperative, and that a prior grant of a similar franchise or privilege to other persons or corporations is no reason why the plaintiff's demand should not be granted."

This constitutional grant of a franchise as it stood prior to October 10, 1911, was construed by the Supreme Court in *Ex parte* Johnson, 137 Cal. 115, in the following language:

> "*The only limitations upon this privilege are those contained in the language in which it is granted*, viz.: that the work shall be done 'under the direction of the superintendent of streets or other officer in control thereof,' and 'under such general regulations as the municipality may prescribe for damages and indemnity for damages.' Upon the compliance with these conditions any individual or company duly incorporated for such purpose, is given the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas light or other illuminating light, or with fresh water for domestic and all other purposes."

The character of this franchise was construed by the Supreme Court in Stockton Gas & Electric Company v. San Joaquin County, 148 Cal. 319, in the following language:

> "We think that the authorities support the contention of respondent * * * that the

> *franchise extended by the constitutional provision* to lay pipes and conduits or erect poles and supply the inhabitants of a city with artificial light *is an incorporeal hereditament—is real estate*—in the nature of an easement pertaining to the streets of a city in which it is exercisable; that it is inseparably annexed to the soil out of which the profit arises, and has a local situation in the place, and that place only, where the right is actually exercised."

This construction of the constitutional provisions, we take it, is that thereby an offer was made of the right to occupy streets and that when this offer was accepted and the streets occupied, there resulted a vested franchise-granted right; that this franchise right, so ripened into a vested right by the actual user thereof, is property, and as such is protected by the federal Constitution.

Although the constitutional provision in question is a general one and names no specific corporation to which it is given, nevertheless, when accepted by any particular corporation, *it becomes a special franchise or charter to that corporation,* but not exclusive, with the same force and effect as if no other corporation had such franchise or charter.

Stanislaus County v. San Joaquin Canal & Irrigation Co., 192 U. S. 201, at page 206, says:

"The Acts of 1853 and 1862 are general laws, the former providing for the formation of corporations of the character named therein, and the latter amending that act, and especially providing for the incorporation of canal companies and the construction of canals. No special charter was given the company directly from the legislature otherwise than is contained in the powers granted by the two acts above named. A company, although organized under a general statute, may nevertheless thereby enter into and obtain a contract from the state which may be of such a nature that it can only be altered in case power to alter was, prior thereto, provided for in the consideration or legislation of the state.

"In Salt Company v. East Saginaw, 13 Wall. 373, it was said by Mr. Justice Bradley, in delivering the opinion of the court, page 373, that:

" 'Corporations formed under general laws in place of special charters, like the Ohio banks under the general banking law of that state, are entitled to the benefit of specific provisions and exemptions contained in those laws, which are regarded in the same light as if inserted in special charters. "The act is as special to each bank," says Justice McLean, delivering the opinion of this court, "as if no other institutions were incorporated under it." In such cases the scope of the act takes in the whole period for which the corporation is formed. The language means that, during the existence of any corporation formed

> under the act, the stipulation of exemption specified in it is to operate.'
>
> "The language used in conferring power to fix rates in the Act of 1862 is to be taken as if it were contained in a special charter granted by the legislature to this company."

And it is the established law of California that any right conferred either by Constitution or by statute which extends generally to all persons or corporations does, when accepted by any particular person or corporation, become a special franchise as to that person or corporation which is subject to taxation as such. Thus, by section 536, Civil Code, telegraph or telephone companies are given the privilege to construct their lines upon public roads or highways. An acceptance of this privilege so given results in the formation of a contract between the company and the state, which is secured by the Constitution of the United States against impairment by any subsequent state legislation, and, furthermore, vests in the company a right of property which is taxable.

Western Union v. Hopkins, 160 Cal. 106, pp. 113, 117, 118;

Sunset Tel. Co. v. Pomona, 172 Fed. 829, 837;

Sunset Tel. Co. v. Pasadena, 161 Cal. 265;

And California cases, *supra*.

It was held in Bank of California v. San Francisco, 142 Cal. 276, that the generality of a constitutional grant does not deprive such right of the character of a special franchise, and that

> "the value of the franchise of a corporation is not limited by the cost of obtaining it. If it were so limited, such franchises as the right to use the public streets for water pipes or gas pipes, for the purpose of supplying a municipality and its inhabitants with water or gas, would be valueless and unassessable, for everybody possesses such rights under the terms of our Constitution."

In Hovelman v. Kansas City R. R. Co., 79 Mo. 632, the company had obtained a franchise from the city to construct its railroad along a certain street. It had constructed only about three miles of that road when the charter of that city was amended so as to require the company to obtain the consent of the abutting property owners for further construction of its railroad. It was held that this subsequent legislation impaired the obligation of a contract, and that the company had a right to *complete* its road. The court says:

> "Basing our conclusion upon the above facts, we are of the opinion that when the grant of the right of way on said streets was accepted by the said company, and more than three miles of road actually constructed, the right of way along all said streets became a vested right which could not be taken away or impaired by legislative enactment." (Citing State v. Miller, 50 Mo. 129.)

In State v. Jersey City, 8 Atl. 123, an act had been passed giving a telegraph company full power to use the public roads or highways of the state. An ordinance was passed by the defendant city giving the plaintiff corporation permission to erect posts and poles in certain streets. The company had proceeded to place its poles along the route marked out by the ordinance, and had placed from 35 to 45 poles, at an expense of about five dollars a pole, and had expended other money in and about the erection of the poles. At this time the ordinance in question was repealed. It was held that the company had an irrevocable right to use the streets designated for the purpose indicated in the statute, and that the repeal of the ordinance could not interfere with those vested rights. It will be noted in this case that the right which was held to be vested was that of planting the poles throughout the *entire* streets designated in the ordinance, although at the time of the repeal only a portion of the poles had been erected.

In Des Moines Street R. R. Co. v. Des Moines Broad Gauge R. R. Co., 33 N. W. (Iowa) 610, the ordinance involved was construed as giving an exclusive right to a street railway company to operate street railway lines. The chief justice of the Supreme Court of Iowa in writing the opinion expressed it as his view that the plain-

tiff's exclusive right did not extend to the streets not entered upon by it until occupied by another company. With reference to this point of exclusive right we are not concerned, but as to the time and extent of the vested right acquired, it is important to note that the majority of the court was of the opinion that the ordinance took effect as a contract in relation to *all the streets* of the city at the time of its written acceptance. We quote from the opinion at page 615:

> "The majority think that the ordinance took effect as a contract in relation to all the streets at the time of its written acceptance by the plaintiff's assignor, which it appears was made soon after the passage of the ordinance; and that the public rights are secured by an implied obligation on the part of the company, acting under the ordinance to hold itself in readiness at all times to construct and operate so much track, and upon such streets, as the public convenience may require, to be determined by the city council in the exercise of a reasonable and proper discretion,—the company to have a reasonable time to complete after the requisition shall be made."

In Board of Mayor, etc., of Morristown v. East Tennessee Telephone Co., 115 Fed. 304, the facts were as follows:

On September 1, 1899, an ordinance was passed by the city council giving to the telephone company the right to erect poles and string wires on the streets and alleys of the city "in such a

way and manner as not to obstruct the streets and alleys and to erect their poles in such a way as to be the least inconvenient to public travel as may be agreed by the street committee." On September 25, 1899, the city council passed a resolution fixing the rates chargeable by the telephone company. On the next day, September 26, 1899, the telephone company accepted in writing the ordinance and the later resolution "as a contract between" the telephone company. As a matter of fact, the city council could only act by ordinance and not by resolution and considerable was made of the point that the acceptance in writing had been made of the ordinance and the unauthorized resolution and the latter being void, it could not act as an acceptance of the ordinance alone. Although considerable attention is given to this argument in the opinion, the written acceptance is treated as a sufficient acceptance of the ordinance alone. On November 17, 1899, the council formally repealed the ordinance of September 1, 1899. It appears from the statement of facts preceding the opinion that before this repealing ordinance and after its written acceptance, the company took steps toward the enlargement of its local facilities and incurred expense in preparing for further, and more considerable extensions. The action brought was one of injunction by the company to restrain the public officials from in-

terfering with its erection of poles and stringing of wires. It was held that the acceptance of the grant contained in the ordinance, by writing and by acts prior to the repealing ordinance had the effect to give the ordinance the force of a contract and render it irrevocable. We quote from the opinion, at page 307:

> "The consent to the occupancy of the streets by the poles and wires of the telephone company for the purpose of maintaining a public telephone system was the grant of an easement in the streets and a conveyance of an estate or property interest, which, being in a large sense the exercise of a proprietary or contractual right rather than legislative, was irrevocable after acceptance, unless the power to alter or revoke was reserved."

And again, at page 309:

> "Street rights so vested cannot be divested without the consent of both parties or by clear acts of abandonment indicating an intention not to accept."

We are not insensible of the rule that, as between the state or the municipality on the one hand, and a private corporation on the other, a grant must be construed against the grantee, and that nothing passes by implication. This, however, is a rule of construction which can be invoked only when there is doubt as to the extent of the grant.

"All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this code."

Civil Code, Sec. 1635.

In Commonwealth v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339, at page 350, it is stated that the state has no more power or authority to construe the franchise than the corporation.

"They are but parties to a contract. Each has equal rights and privileges under it, and neither can interpret its terms authoritatively, so as to control and bind the rights of the other. By becoming a party to a contract with its citizens, the government divests itself of its sovereignty with respect to the terms and conditions of the compact, and its construction and interpretation, and stands in the same position as a private individual. If it were otherwise, the rights of parties contracting with the government would be held at the caprice of the sovereign, and exposed to all the risks arising from the corrupt or ill-judged use of misguided power. The interpretation and construction of contracts, when drawn in question between the parties, belongs exclusively to the judicial department of the government. The legislatures have no more power to construe their own contracts with their citizens, than those which individuals make with each other."

Vide also:

City of Binghamton v. Binghamton Ry. Co., 16 N. Y. S. 225.

Proceeding now from the proposition that by the construction of its generating plant and the occupation of certain of the streets there resulted a contract between the people of the state and the company which could not thereafter be impaired, we approach the argument that to prevent the company from now *extending* its works would deprive it of property in precisely the same manner as would an attempt to deprive it of the use of the streets already occupied. As noted, the petition shows that the company's generating plant was constructed at large expense for the purpose of supplying many more inhabitants of the city of Los Angeles than it was supplying on October 10, 1911, and that its mains and conduits have been built with that purpose in mind; further, that the company cannot, from the territory then supplied by it, obtain sufficient revenue to enable it to operate its works except at a loss of more than two thousand dollars per month. The right, therefore, to extend its system is necessary to the full and complete enjoyment of the original grant.

The definition of Fearne of a vested right, as therein adopted (page 673) is, "an immediate fixed right of present or future enjoyment," and by Chancellor Kent as "an immediate right of present enjoyment, or a present fixed right of future enjoyment."

The leading case of Pearsall v. Great Northern Railway, 161 U. S. 646, enunciates certain principles which are pertinent to this particular question, and holds that the refusal to allow a fulfillment of a partially completed purpose is as much a deprivation of property within the constitutional protection as the taking away of the entire system would be.

As to the rights of the railroad corporation under consideration, the court said (page 673):

> "As applied to railroad corporations, it may reasonably be contended that the term extends to all rights of property acquired by executed contracts, *as well as to all such rights as are necessary to the full and complete enjoyment of the original grant, or of property legally acquired subsequent to such grant.* If, for example, the legislature should authorize the construction of a certain railroad, and by a subsequent act should take away the power to raise funds for the construction of the road in the usual manner by a mortgage, or the power to purchase rolling stock or equipment, such acts might perhaps be treated as so far destructive of the original grant as to render it valueless, although there might in neither case be an express repeal of any of its provisions. Sala v. New Orleans, 2 Woods 188." (Italics ours.)

This case holds that the railroad company had not acquired a vested right to consolidate with another road, although that power was given by the original charter of its predecessor in in-

terest, and bases this denial upon the proposition that the consolidation was something

> "unnecessary to the main object of the grant and not directly and immediately within the contemplation of the parties thereto,"

and that therefore the power so conferred, so long as it was unexecuted, was within the control of the legislature and might be revoked.

The principles of this case when applied to the present question are, we submit, decisive of it, because the right of the gas company to use the streets for the purpose of conducting its gas from its main feed pipes is "necessary to the main object of the grant" and obviously was "within the contemplation of the parties" when its mains were built.

Further, the right to use streets in addition to those already occupied was a present fixed right of future enjoyment, because, in the language of the foregoing case, it was

> "such a right as is necessary to the full and complete enjoyment of the original grant, or of property legally acquired subsequent to such grant."

As stated in the case of Mercantile Trust Co. v. City of Denver, *supra*, the company has an

> "inchoate right to extend its lines and complete its system as public necessity might demand in keeping with the growth of the city."

See also upon this point Des Moines Street R. R. Co. v. Des Moines Broad Gauge R. R. Co., *supra*, and Board of Morristown v. East Tennessee Tel. Co., *supra*.

The language used by Justice Lurton in Boise Artesian H. & C. Water Co. v. Boise City is very pertinent to the question involved in this case. In that case there was simply a general grant to a water company to lay and repair a distributing system in the streets of the city, and it was claimed by the city that this was only a license. The court in discussing the question uses this language:

> "The grant of the right to lay water pipes upon the streets for the purpose of distributing water, found in the ordinance of October 3, 1889, purports to be nothing more than a grant of the right to occupy the streets of the city with the distributing pipes of the water company. It was accepted, and about $200,000 has been expended in the construction of the necessary works and the laying of its system of pipes under the streets. The assertion of the right to require the company, after so many years of occupation, to pay a monthly rental for the use of the streets, is grounded upon the claim that under the grant to the Eastmans it had obtained nothing more than a revocable license, and its occupation of the streets was therefore subject to be terminated at any time.
>
> "The right which is acquired under an ordinance granting the right to a water

company to lay and maintain its pipes in the streets is a substantial property right. It has all of the attributes of property. * * * The grant was made in contemplation of the investment of large capital in the construction of a system of waterworks for the permanent supply of the city with water. The presumption is that no such enterprise would have been entered upon if the street easement was subject to immediate revocation. The city had the express power to provide its inhabitants and itself with water, under its legislative charter. It could not grant a corporate franchise to a water company. Neither did it undertake in this ordinance to enter into a contract for a supply of water for public or private purposes. What it undertook to do was to grant to those who proposed to construct and maintain works for that purpose the right to 'lay and repair' their distributing pipes along the streets of the city. There is no limitation in the general law of the state, nor in the charter of the city, as to the duration of a contract granting an easement in the streets for that purpose, unless it be found in § 2710, Revised Statutes of Idaho, being § 2838, Revised Codes of Idaho."

VI.

The Franchise Granted by the Constitution of 1879 to Gas and Water Companies is What is Generally Spoken of as a "Blanket" Franchise. This Kind of a Franchise is a Valid Grant and When Accepted is as Binding as if the Corporation Had Occupied All the Streets of the City.

People *ex rel.* Woodhaven Gas Co. v. Deehan, 153 N. Y. 528, 47 N. E. R. 787;

San Antonio Traction Co. v. Altgelt, 81 S. W. 106, 200 U. S. 304;

City of Houston v. Houston St. Ry. Co., 19 S. W. 127, 83 Tex. 548;

City of Burlington v. Burlington St. Ry. Co., 49 Ia. 144;

Nash v. Lowry, 33 N. W. 787, 37 Minn. 261;

Citizens' St. Ry. Co. v. City Ry. Co., 56 Fed. 746, 64 Fed. 647;

City Ry. Co. v. Citizens' St. Ry. Co., 166 U. S. 557;

Indianapolis Cable Ry. Co. v. Citizens' St. R. R. Co., 24 N. E. 1054-1061, 127 Ind. 369;

Gulf City St. Ry. Co. v. Galveston Ry. Co., 65 Tex. 502;

Paterson & Passaic Horse R. R. Co. v.

Mayor and Aldermen of Paterson *et al.*, 24 N. J. Eq. 158;

People v. Chicago, 220 Ill. 238;

Des Moines St. Ry. Co. v. Des Moines S. Ry. Co., 73 Ia. 513, 33 N. W. 610, *id.* 35 N. W. R. 602;

Des Moines Ry. Co. v. City of Des Moines, 151 Fed. 854;

Mercantile Trust Co. v. Denver, 161 Fed. 769;

Denver v. Mercantile Trust, 201 Fed. 790, p. 808;

Elliott on Roads and Streets (2nd Ed.), 752.

In the case of San Antonio Traction Co. v. Altgelt, *supra*, the ordinance was a blanket in form and was held valid.

In the case of Houston v. Houston, *supra*, the ordinance granting the right of way was as follows:

> "This grant is made through and over any and all streets of the city of Houston, and the bridges thereof, including the bridges crossing Buffalo and White Oak bayous, which may be owned by the city of Houston, excepting that portion of Main street south and west of Capitol street, and that portion of Franklin street east of San Jacinto street, which portions of said streets are hereby reserved from this grant."

The court, in sustaining this grant, announced that as long as the city was not prohibited by the terms of the ordinance from extending similar franchises to other companies, it was not void, and could not be impaired by the authorities of the city.

The syllabus in Burlington v. Burlington, *supra*, is as follows:

> "Where a city granted to a street railway company the right to lay a double track in its streets, and thereupon the company expended a large amount of money in the enjoyment of the franchise thus conferred, it was held that the city could not afterward, by amendment to the ordinance conferring the franchise, limit the company to a single track in a street through which it proposed to extend its line."

In Nash v. Lowry *et al.*, *supra*, the syllabus states the point decided as follows:

> "The common council of St. Paul, by ordinance, granted in terms the right to lay street railway tracks in any or all the streets of the city (with certain exceptions). Subsequently the legislature 'confirmed and validated' the ordinance. Held, that it is immaterial to the validity of the grant whether the parties to whom the right was granted constitute a corporation or only a partnership."

In that case, before the railway company had laid any tracks on Pleasant avenue or Oak street between Sixth and Ramsey, and as it was about

to lay tracks on Pleasant avenue, the city council passed an act attempting to revoke and repeal the grant it had given the railway company. The court denied its right and held this could not be done.

The case of Citizens' Street Ry. Co. v. City Ry. Co., 56 Fed. 746, 64 Fed. 647, and now entitled City Railway Company v. Citizens' Street Railroad Company, 166 U. S. 557, concerned a blanket grant to the complainant, while the grant to the defendant was on certain designated streets, a portion of which the complainant occupied and a part of which it did not. The court sustained the blanket franchise, but did not pass upon its duration.

The Supreme Court of the United States, 166 U. S., at page 570, said:

> "We are therefore of the opinion that the complainant company had a valid contract with the city, under the original ordinance of January 18, 1864, as amended by the ordinance of April 7, 1880, which will not expire until January 18, 1901, and that the contract and ordinance of April 24, 1893, with the defendant company is invalid, in so far as it may be construed to interfere with the complainant in the construction, operation and maintenance of its street car system in the city of Indianapolis."

It is to be observed that the Supreme Court in this case and in the extract we have made there-

from refers to the complainant's operation and maintenance of its street car "system" in the city of Indianapolis.

The case of Mercantile Trust Co. v. City of Denver, *supra*, is a recent case upon this subject, the reasoning in which commends itself to any thoughtful mind. We quote from it for the convenience of the court, as follows:

> "It will be noticed that the ordinance of 1885 does not give, expressly by terms, an easement on all the streets. Neither is it shown or claimed that an attempt has ever been made by the street car company to build on any street where public necessities did not require a new line or an extension, nor has it failed to build or extend its lines when and wherever needed, nor has there ever been dispute between the council and street car company in this regard. The interests of the company would necessarily dictate the building of new lines and extensions when and where public demands required it; and if for that purpose there were sufficient reason why one street rather than another should be occupied, I doubt not that the police power, which cannot be surrendered and may be invoked at all times by the council, is amply sufficient to control the company in that respect. In fact, ordinances of the city, in force at the time of the repeal, provided that no excavation should be made in any street, and no railway of any kind should be constructed in any street or avenue, until a permit had been issued for that purpose. In addition to this, an act of the Colorado legislature,

approved April 4, 1877 (Gen. Laws 1877, § 2655, Subd. 60), and still in force, requires the written consent of the owners of land representing more than one-half of the frontage on the street before such street can be occupied by a street railway. So, the asserted fear that the public may be annoyed by street cars operated on the four sides of every city block does not appear to be a possibility, either in fact or in law.

"The repealing ordinance was passed without any reason assigned or now claimed. It was and is, professedly, the mere exercise of a naked power, which the city asserts the street car company and the complainant have no right to challenge. The company appears to have planned, almost in the inception of its efforts, a system radiating from a central point in the business section of the city from which its cars start, extending in different directions and to which they return. From its main lines in the central part branches have been, and from time to time as public demand requires, necessarily will be taken off, and lines have been, and will be, as it was intended, extended to meet the city's growth. Can it be said, that after this system was partly built, under large expenditures, extending but a few blocks in either direction, and branches taken off here and there but a short distance, the other party to the contract may terminate it without cause? Is not this a violation of the whole purpose and intent of the agreement? Is not the exercise of the power to repeal the ordinance of 1885 nothing short of an attempt to destroy the company's property? If such repeal is a valid exercise of power, the company could not thereafter make extensions

in any direction. Its whole purpose and plan is thereby thwarted. The foundation of its system has been laid, but it cannot proceed. It is left with a useless trunk covering but a few blocks in the central part of the city. Its usefulness, both to the public and the company, has been destroyed without cause and without its being heard. A just and salutary rule covering the situation here, is announced in Elliott on Roads and Streets (2nd Ed., § 752):

" 'While it is, we believe, true that some act must be done vesting the inchoate right conferred by general grant, still, we do not regard it as essential that manual possession should be taken of all of the streets or roads embraced in the general grant or license. If the company having the prior right enters upon the work of constructing a system, and with reasonable diligence, and in good faith, does actually construct a considerable part of the system, it ought not to lose its rights unless it has failed to comply with a proper demand to complete the system, or has unreasonably delayed its completion.'

"This text is quoted with approval in Indianapolis Cable S. R. Co. v. Citizens' Street R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539, and that court then adds:

" 'Where a company has entered upon the construction of a particular system of street railroads, and has expended its money in the prosecution of the work, it would be manifestly unjust to permit some other person or company, after the commencement of the work, to jump in and appropriate any portion of the streets involved in such system, while the former was diligently prose-

cuting the work, and thus destroy the system, to the ruin of the company engaged in its construction. If this could be done no person or company would undertake the construction of a system of street railroads; but to hold the right to such system, money should be expended in its construction, and the work, with a view of its completion, should be diligently prosecuted without intermission, unless stopped by circumstances over which the projector has no control.'

"The street car company had, at the time of the attempted repeal, a prior, though inchoate, right under the ordinance of 1885, to extend its lines and complete its system as public necessity might demand in keeping with the growth of the city; and the city was without power to terminate its rights in that regard except for cause. It does not claim that any such cause existed at the time of the passage of the repealing ordinance. Said repealing ordinance having been passed without right, and in violation of the rights of the street car company and of those whom the complainant represents, the same is void."

This case was affirmed in

City of Denver v. Mercantile Trust Co., 201 Fed. 790, p. 808 (7).

In the case of People *ex rel.* Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 47 N. E. R. 787, the Court of Appeals of New York had under consideration a grant in the words and figures following:

"We, the undersigned, supervisor, town clerk, justices of the peace, and commissioners of high-

ways of the town of Jamaica, in the county of Queens, and state of New York, do hereby consent that the Woodhaven Gaslight Company may have the power, and the same is hereby conferred upon and granted to them, of laying conductors for conducting gas in and through the public streets and highways of said town of Jamaica."

In discussing the case, the court said:

> "The learned court below reversed the order in favor of the relator, solely upon a construction of the grant which, we think, is altogether too narrow. It was held that the consent of the town authorities applied only to streets and highways then existing, and not to streets and highways thereafter opened or used, and that since that part of Broadway in the village, newly incorporated from the town, did not exist as a street or highway when the grant was made, the right to lay conductors in that street had never been acquired by the relator. The rule that public grants are to be construed strictly against the grantee means simply that nothing shall pass by implication except it be necessary to carry into effect the obvious intent of the grant. But the obvious intention of the parties, when expressed in plain language, cannot be ignored in a public any more than in a private grant. A construction that would lead to false consequences or unjust or inconvenient results, not contemplated or intended, should be avoided in a grant as well as in a statute. It is well known that business enterprises such as the relator is engaged in are based upon calculations of future growth and expansion. A franchise

for supplying gas not only confers a privilege, but imposes an obligation, upon the corporation to serve the public in a reasonable way. The relator is bound to supply gas to the people of the town upon certain conditions and under certain circumstances, and it would be most unjust to give such a construction to the consent as to disable it from performing its obligations. It cannot reasonably be contended that the relator is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when made. When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as in the old. Such a grant is generally in perpetuity or during the existence of the corporation, or at least for a long period of time, and should be given effect according to its nature, purpose and duration. There is no good reason for restricting its operation to existing highways, unless that purpose appears from the language employed. It is not claimed that any such limitation was expressed, and none can be implied from the nature of the case. The language of the consent confers the right to place the conductors in the streets, upon compliance with reasonable regulations, not only as the streets then existed, but as subsequently enlarged or changed. That is what the grant contemplated when made, and such is the fair meaning of the language used. The order

of the appellate division should be reversed, and that of the special term affirmed, with costs. All concur, except Gray, J., absent, and Vann, J., dissenting. Order reversed."

To the same effect is

People *ex rel.* Chicago v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245.

The Extent of the Right Conferred by the Constitutional Provision is Not the Quantum of the Acceptance but the Quantum of the Offer.

As has been held in the authorities already cited, the provisions of the Constitution contained an offer to any individual or company to use the streets and to lay down pipes and conduits therein and connections therewith, so far as might be necessary to supply the city and its inhabitants with light or water. There is no formal method provided by which this offer may be accepted, such as by notice or other written communication. It can only be accepted by the acts of the company, but when accepted it must result in the formation of a contract, the breadth of which is measured not by its acceptance but by its offer. The acceptance cannot vary from the offer, as otherwise there would be no meeting of minds. The contract that results must be as extensive as the offer, or otherwise there can be no contract. To say that the company has accepted the offer of the state only to the extent

to which it has actually occupied the streets is equivalent to saying that the company has not accepted the offer in its entirety, and, if so, then no contract exists at all.

We submit that the confusion which must necessarily result from an attempt to confer upon the company as vested rights the right only to use those streets which were actually occupied prior to the amendment is caused by interjecting into the reasoning an illogical factor. The thing that the company was to do in order to avail itself of the offer was to establish a *distributing system* in the city. This could not be built at one time and must, necessarily, from time to time expand with the growth of the city.

The Supreme Court of California said, concerning a water company:

> "The construction of municipal waterworks is a matter of growth. It is necessary in common prudence, on the one hand, to construct the works of such capacity as to satisfy the needs of the growing city, not only at the moment, but within the near future; and, on the other hand, not to extend them so much as to cast an unnecessary burden on the stockholders, or the present consumers. As such works are a necessity to the city, they must keep pace with, and to some extent anticipate, its growth. When constructed they stimulate to that extent the progress of the city, and tend, like all conveniences, to lower the general cost of production of all things. It re-

sults that at least the first water system in any city occupies the position of a pioneer. At any expense the works must be constructed, and usually no reward can be realized by the constructors until some time has elapsed. * * *

"Those who engage in it put their property entirely into the hands of the public. Having once embarked it is beyond their power to draw back. They must always be ready to supply the public demand, and must take the risk of any falling off in that demand. They cannot convert their property to any other use, however unprofitable the public use may become. They have expended their money for the benefit of others, and subjected it to the control of others. That money has, in effect, been taken by the public; and the public, while refusing to return that money, cannot be heard to say that it no longer has need for all of it."

San Diego Water Co. v. San Diego, 118 Cal. 556, pp. 568-9.

It is not, then, the occupation of any particular street or streets which is the decisive point, but, rather, whether or not the company had, prior to the amendment, manifested its intention of establishing a distributing *system* in the city. If it has done so, then it has accepted the offer made by the state. Instances can readily be cited to illustrate this:

(a) A water company, we may assume, had constructed along a single street of a city its main conduit to a reservoir in the heart of the

city and intended to utilize the streets radiating therefrom for its distributing system. Without this distributing system its main conduit is of no value and the money invested in the construction of the system up to that point can result in no revenue. If the constitutional change had resulted in limiting this company to this single street so occupied, then it is as surely deprived of its property as if the right to this street was also taken away. We submit that it was not the actual physical occupation of this single street that manifested the intention of the company to assent to the contract, but, rather, it was the *character of the construction done* in relation to the construction of a larger distributing system. If, as a fact, this main conduit had been built with the *bona fide* intention of making it the source from which distributing pipes could be drawn, and the board of public works so concluded, then surely the right to complete that system thus begun was a vested right; or, again:

(b) An electric company, we will assume, has constructed a main feed wire or system to a central step-down station, from which it intends to distribute electric energy for illuminating purposes. To limit it to the single street over which this main feed wire is constructed and prevent it from extending that system over other streets would, as noted above, quite destroy the value of the construction already made. Or, again:

(c) Assume that a company had, for merely temporary purposes, placed poles and wires of a temporary character throughout all the streets of Los Angeles, but such construction was not intended as a part of a permanent system, but, on the contrary, was intended merely as a temporary occupation of the streets to fulfill a passing need. Such company would not have a vested right even over the streets that it had actually occupied, because it had not, even by such construction, manifested an acceptance of the offer of the state, which, as noted above, is to establish a permanent distributing system for the city and its inhabitants.

It would therefore seem that a solution of the inquiry as to whether or not a particular company had acquired a vested right on October 10th to extend its existing system, necessitates the further inquiry, not as to what actual streets it had up to that date occupied, but had it prior to that date, instituted in Los Angeles the beginning of a system in such a substantial and *bona fide* way as to warrant the conclusion that it intended to extend this system as the increasing demands of its customers necessitated.

In the case of Western Union Tel. Co. v. Hopkins, 160 Cal. 106, it is said by the Supreme Court of the state of California that the offer of the state to the extent that it was accepted

by the actual occupation of the highways prior to a modification of the law, created vested rights, and the same language is repeated in the Pasadena case, 161 Cal. 265. The court did not have before it in either of these cases any question as to the right to use the streets for an extension of any existing system. It was concerned only with the legality of taxation upon a franchise, and not with the extent or value of that franchise. The reasoning of the court was to the effect that a franchise right had been created which was taxable when the offer of the state was accepted by the actual occupation of the streets. This was all that the court was required to pass upon in order to decide the question then before it. We do not understand the language to mean that the court there held that the *only* vested rights conferred were in the streets actually occupied, and if such meaning was intended, it is obviously *obiter dicta*. As before stated, the single fact which the court considered was whether or not there was a contract *at all*, and it held that there was.

We would suggest that a careful distinction must necessarily here be made as to the precise property right conferred upon the corporation. It is not a vested property right in any particular street or location, but it is in a *contract;* (Grand Trunk W. R. Co. v. South Bend, 33 Sup. Ct. Rep. 303, p. 306; 227 U. S. 544); the

occupation of the street is merely the method of manifesting an assent to the contract. The familiar doctrine of unilateral contracts may be illustrative.

If A offers to B certain property provided the latter will perform a certain act, and B does perform that act, he then becomes entitled, not to the fruits of the act which he has performed, but to the property which A has offered. The property right created by any contract and which vests in the offeree upon acceptance is that which is offered *to* him. To say that the company has only acquired a property right in the streets actually occupied by it, is to say, in effect, that it is limited to the *quantum* of the subject-matter of the contract which it has contributed thereto, and not to the consideration which moved from the state.

Similar questions have been considered in relation to railroad aid bonds, as where a municipality has promised to pay a sum to a railroad company upon the construction of its road. The municipality is bound, if the road be constructed, even though the contract was unilateral and there was no obligation on the part of the company to build the road. (Nevada Bank v. Steinmitz, 64 Cal. 301.) When the road has been constructed the company becomes entitled not to the reasonable value of the work and labor done, but to the sum of money which the

city promised to pay. Under what theory can it be said, then, that the company is entitled to the use of so much of the streets as it has actually occupied, and not to any more? It would seem that it is entitled either to all of that which was granted to it or to nothing. Just as the railroad company, in the supposititious case, would be entitled to all the money promised by the city or to none at all. In no event could it obtain from the city the reasonable value of the work and labor done upon an uncompleted system.

We repeat, that the constitutional offer was the right to use *all* the streets of the municipality and to lay down pipes and conduits therein. This right must have been either accepted as a whole or not at all. The Constitution never contemplated that a corporation could elect to occupy only a portion of a city. On the contrary, it must be prepared to extend its distributing system throughout the whole city, if desired, or otherwise it has no rights under the Constitution.

There is a practical difficulty which must arise by a holding that the company has acquired vested rights only to the extent of the actual portions of the streets occupied by it on the date of the amendment. Does this mean that a vested right has been acquired for the whole of that particular street or for only the

exact portion of it then actually occupied by, we will say, a single pipe or conduit? If so, then the company could not, as the growing needs of its business might demand, change or enlarge the system then installed by constructing and maintaining additional or larger pipes or conduits. To hold that it could not do so would be directly contrary to the decision of the Supreme Court of California in Workman v. Southern Pacific, 129 Cal. 536.

In this case it was held that an ordinance giving a railroad company the right to construct a railroad track over a certain street in Los Angeles, called Alameda street, was not exhausted by the laying of a single track over a portion of that street, but that, as the growing needs of the business required, the company could remodel that system by constructing a double track; that it was not required to make an immediate election of the grant to its entire extent, and,

> "In the absence of any limitation to that effect, the council must be deemed to have granted the right of way with the privilege to the company to construct a single track upon the street at the outset, *and the continued right to construct an additional track thereon in the future whenever it should become desirable from the necessities or convenience of operating its road.*" * * * "Such use, and the necessity therefor, can be determined only as time and experience

> shall demonstrate, and may properly be left to the determination of the company. The grant to the defendant in section 1, above quoted, of the use of Alameda street without any limitation or qualification, leaves to the company the right to make such use of the street as the city could authorize and as circumstances may at any time hereafter require."

Under this decision we think it clear that the company could, as circumstances might require, enlarge or change its system installed upon a particular street. What difference is there in principle between extending an existing system over a new street and enlarging it over the same street?

Again, it was held in Merced Falls Co. v. Turner, 2 Cal. App. 720, that the constitutional grant in question, after it had been exercised by a company, did not prevent the municipal authorities, in the exercise of its police power, from requiring a change in the position of the poles. And it was therein stated that the grant did not give

> "an absolute indefeasible right or easement in the particular spots of earth where its poles were planted originally."

This shows that the occupation of a particular place or spot in the street is not the measure of the vested right obtained by the company, for, if so, it would have no right to move its

pole to any other place in the street. If actual occupancy be the test, the company could not move its pole, which was precisely what was held in the Merced Falls case it must do. There can be no legitimate difference between the occupation of another place or spot in the same street and the occupation of a new street.

These suggested difficulties would not occur if the principle for which we contend be adopted, viz.: that this is not an easement in any particular spot or strip of land but a vested contract right to occupy such portions of the streets as may be necessary to provide a complete distribution *system* and not to erect or maintain a number of isolated or detached poles or pipes.

In Elliott on Roads and Streets, Third Edition, Sec. 949, we find the following:

> "While it is, as we believe, true that some act must be done vesting the inchoate right conferred by general grant, still we do not regard it as essential that manual possession must be taken of all of the streets or roads embraced under the general grant or license. If the company, having the prior right, enters upon the work of constructing a system and with reasonable diligence and in good faith does actually construct a considerable part of the system, it ought not to lose its rights unless it has failed to comply with a proper demand to complete the system or has unreasonably delayed its completion."

VII.

The Obligations of a Valid Contract Cannot be Impaired by the Adoption of a New Constitution Any More Than They Can be by the Enactment of a Law by the Legislature.

Ede v. Knight, 93 Cal. 159;
McCracken v. Hayward, 2 How. 607;
Western Union v. Hopkins, 116 Pac. 557.

VIII.

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Capitol City Light & Fuel Co. v. Tallahassee, 186 U. S. 401;
Stanislaus County v. San Joaquin & Kings R. etc. Co., 192 U. S. 201;
Western Union v. Hopkins, 116 Pac. 557, 563.

Conclusion.

We therefore hold:

1. That the constitutional change did not affect the question involved.

2. That the ordinance under which petitioner was arrested is invalid, because its enforcement would impair the obligation of a contract between the state of California and the Economic Gas Company, contrary to the provisions of the federal Constitution.

3. That the enforcement of the ordinance would deprive the Economic Gas Company of its property and rights already vested on October 10, 1911, and that this vested right included the right and power to extend its distributing system, without which the work already constructed would be a loss.

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Attorneys for Plaintiff in Error.

SUPPLEMENT.

"DUTY TO FURNISH GAS, ELECTRICITY, STEAM OR HEAT. Upon the application in writing of the owner or occupant of any building or premises distant not more than one hundred feet from any (gas or steam) main, or direct or primary wire of the corporation, and payment by the applicant of all money due from him, the corporation must supply (gas, electricity, steam or heat) as required for such building or premises, and cannot refuse on the ground of any indebtedness of any former owner or occupant thereof, unless the applicant has undertaken to pay the same. If, for the space of ten days after such application, the corporation refuses or neglects to supply the (gas, electricity, steam or heat) required, it must pay to the applicant, the sum of fifty dollars as liquidated damages and five dollars per day, as liquidated damages for every day such refusal or neglect continues thereafter."

Section 629, Civil Code, as amended.

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~~No. 913~~

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1912

ROBERT RUSSELL,
Plaintiff in Error,
vs.
CHARLES E. SEBASTIAN,
Defendant in Error.

No. 415.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

WARREN GREGORY,
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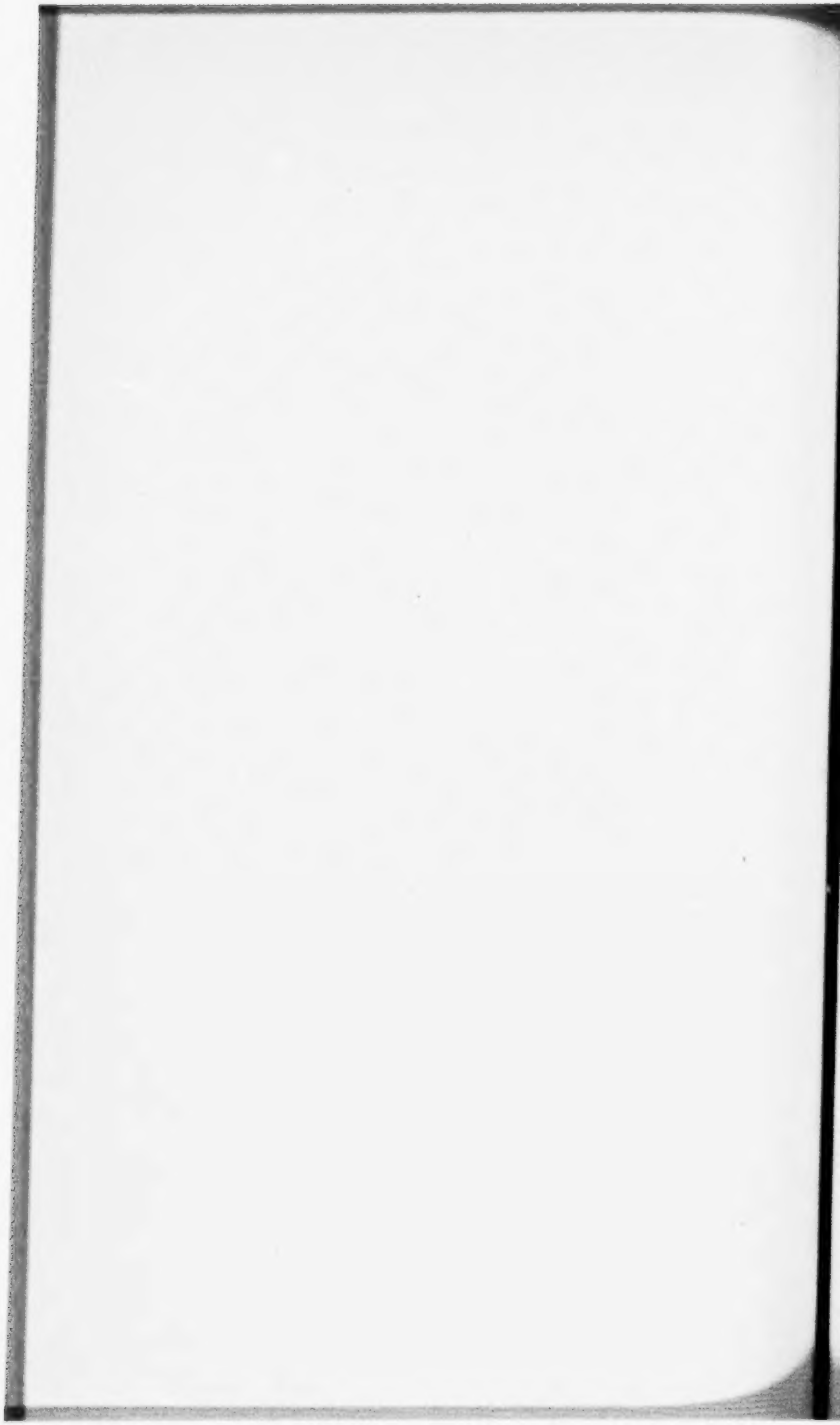

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No. 913

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1912

ROBERT RUSSELL, *Plaintiff in Error,* vs. CHARLES E. SEBASTIAN, *Defendant in Error.*	Error to the Supreme Court of the State of California.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

Statement.

This case involves consideration of a change in the constitution of the State of California.

In the year 1879 California adopted what was then known as its New Constitution. Section 19 of article XI was as follows:

> "Sec. 19. No public work or improvement of any description whatsoever shall be done or made, in any city, in, upon or about the streets thereof, or otherwise, the cost and ex-

pense of which is made chargeable or may be assessed upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment, in proportion to benefits, on the property to be affected or benefited, shall be levied, collected, and paid into the city treasury before such work or improvement shall be commenced, or any contract for letting or doing the same authorized or performed. In any city where there are no public works owned and controlled by the municipality, for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

In 1885 this section was amended by the omission of the first sentence so that from this time forward to October, 1911, it read as follows:

"Sec. 19. In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this

state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

The period in which this provision was in force was one of great development in California, particularly in the growth of the cities and towns. We learn from the United States census reports that during this period of thirty-one years, the population of the state increased from 864,694 inhabitants in 1880 to 2,377,549 inhabitants in 1910 and the number of cities and towns of over 2,500 inhabitants increased from 31 in 1890 to 65 in 1910. This period also more than measured the span of the application of electric energy to power and lighting purposes. Under this constitutional provision, therefore, gas, electric and water companies grew from small beginnings to plants commensurable with the increased and new needs of these cities and towns. Not only the streets which were in existence in 1879, but also new streets and highways which were dedicated in the new cities and subdivisions were occupied

by pipes and conduits placed there in reliance upon this constitutional grant.

The courts of the state were early called upon to construe and define the rights granted by this section. In a series of decisions by the Supreme Court of California, the right of the gas or water company to use the streets for the purposes named and as a direct grant from the people was consistently affirmed, and the power of the municipality to demand a franchise or other municipal permit therefor was as consistently denied. The provisions of the constitution were held to be mandatory in compelling the municipal authorities to permit the use of the streets for the purpose of supplying the city and its inhabitants, and prohibitory in denying to these authorities any interference amounting to prohibition with an individual or corporation that desired to use the streets for such purposes.

These decisions are:

People v. Stephens, 62 Cal. 209;
Pereria v. Wallace, 129 Cal. 397;
In re Johnston, 137 Cal. 115;
Denninger v. Recorder's Court, 145 Cal. 629;
Stockton Gas and Electric Co. v. San Joaquin County, 148 Cal. 313.

On October 10, 1911, the people of the state amended this section of the constitution so that it thereafter read as follows:

> "Sec. 19. Any municipal corporation may establish and operate public works for supply-

ing its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

The Economic Gas Company is a corporation created under the laws of the State of California on May 18, 1909, for the purpose of supplying the City of Los Angeles and its inhabitants with gaslight. This city has no public works owned or controlled by it for this service.

In June, 1909, Economic Gas Company acquired, for a valuable consideration, gas works and conduits already built and laid (by its predecessor) in Los Angeles, and thereupon under a general plan of extension commenced to extend this system from street to street so that at the time of the passage of the constitutional amendment of October 10, 1911, it had laid more than twenty-nine miles of main pipes and conduits in the streets, and was

supplying more than thirty-five hundred consumers with gaslight. These mains were so laid in the streets under the constitutional authority as then given, and they were a part of the general design and plan of the company by which it should extend its system to every part of the city and this work of extension had been diligently prosecuted up to the time of this constitutional change. The generating plant and the initial construction of the gas company was far more expensive and contained a much greater capacity than was necessary to supply the territory abutting on or contiguous to the streets which were occupied by the company's mains on October 10, 1911, and the company had gone to an expense of more than one hundred thousand dollars more than was necessary to supply this limited territory. On account of this increased expense of construction the company cannot supply this limited territory and population except at a constant loss of more than two thousand dollars per month; and it is impossible to serve new customers without extending its street mains and conduits.

In pursuance of its general plan of extension the gas company had, prior to the constitutional change, entered into contracts with many prospective consumers in Los Angeles to supply them with gaslight, and in order to reach such consumers it is necessary that the company extend its street mains and occupy more streets and thoroughfares than it theretofore has done. During all of this

time there was contained in the Civil Code of the State of California a certain section numbered 629 which provides that it is the duty of any corporation engaged in the business of generating and supplying gas, to furnish upon application to the owner or occupant of any building not more than one hundred feet from any main of the company the gas demanded, and in default thereof the company is liable in penal damages to the applicant in the sum of fifty dollars and five dollars per day, in addition, for each day of such refusal. Such applications have been made to Economic Gas Company, but the company cannot comply with them without extending its mains in the streets.

On October 26, 1911, the City of Los Angeles adopted an ordinance, number 23,624, which provided that no person or corporation should exercise any rights in the streets of that city until a grant or franchise had been obtained from the municipal authorities. And on February 21, 1912, another ordinance, number 24,410, was adopted which contained many and minute provisions concerning the manner of excavating the streets, and required a written permit from the Board of Public Works before such work could be commenced.

On February 23, 1912, the company applied to the Board of Public Works of Los Angeles for permission to make excavation in Sunset Boulevard for the purpose of laying down its mains and gas pipe therein and to extend its system in order to supply the inhabitants of the city in accordance

with its outstanding contracts, and offered to comply with such general regulations as might be prescribed for damages and indemnity for damages and the manner and method of opening such street and laying these conduits. In response to this request, the company was informed by the Board of Public Works that there were no general regulations of the city on the subject that the gas company had not complied with, but that the company would not be permitted to open the street or lay its pipe therein unless it first obtained a franchise in accordance with said ordinance number 23,624. Whereupon the gas company notified the Board of Public Works that it intended to extend its main along the street, in pursuance of rights granted to it by the constitution of the state, for the purpose of supplying the city and its inhabitants with gaslight. To this the Board of Public Works replied that they would not allow the company to extend its distributing system solely from the fact that the board were advised that by reason of the constitutional change the right of the gas company to use any portion of the public streets and thoroughfares of the city for the purpose of supplying the city and its inhabitants with light had been completely taken away save and except as to those portions which had been actually occupied by the corporation for such purpose prior to the date of such change.

On February 27, 1912, plaintiff in error, Russell, an employee of Economic Gas Company, was pro-

ceeding to do work on Sunset Boulevard for the sole purpose of putting down a conduit and gas pipe therein, whereupon he was arrested on the charge of committing a misdemeanor by violating the terms of the said ordinance in doing this work without first obtaining a franchise from the city.

The plaintiff in error then presented to the Supreme Court of the State of California his application for a writ of habeas corpus in which he alleged generally the aforesaid facts, and stated further that by reason of them the Economic Gas Company had, prior to October 10, 1911, accepted the grant given by the constitution as the same stood prior to October 10, 1911, and that to now prevent the company from extending its lighting system would impair the obligation of its contract.

The allegations of this petition were not traversed.

The learned court below (163 Cal. 668) decided:

One. That by this amendment the direct grant from the people to use the streets which had previously existed was taken away, and that the municipality thereafter had the right to impose such conditions and restrictions upon such right as it saw fit, including the exaction of a franchise.

Two. That a public service corporation that had installed its service in a city prior to the amendment had a vested right to continue to use the streets which it had occupied before such amendment, but that it had no vested right to lay down

and maintain its pipes and conduits in other streets or to extend its system to other parts of the same street.

We shall invite this court's attention to the second of these propositions.

The application for the writ of habeas corpus being denied, and a petition for re-hearing thereof being also denied, plaintiff in error sued out this writ.

Specifications of Error Relied Upon.

Plaintiff in error says that there is manifest error on the face of the record in the following particulars, to-wit:

1. The Supreme Court of the State of California erred in not deciding that the amendment of the constitution of the State of California and the ordinances of the City of Los Angeles were contrary to the provisions of section 10 of article XI of the constitution of the United States which prohibits any state from passing a law impairing the obligation of a contract.

2. The Supreme Court of the State of California erred in holding and deciding that the Economic Gas Company did not have a contract with the City of Los Angeles under section 19, article XI of the constitution of the State of California, which entitled the said Economic Gas Company to lay its gas pipes and mains in the City of Los Angeles.

3. The Supreme Court of the State of California erred in deciding that the ordinance under which petitioner was arrested was valid, and in deciding that its enforcement would not impair the obligation of the contract between the State of California and the Economic Gas Company contrary to the provisions of the federal constitution.

Argument.

I.

CERTAIN PRINCIPLES WHICH ENTER INTO A CONSIDERATION OF THIS CASE HAVE BEEN SETTLED BY PREVIOUS DECISIONS OF THIS COURT AND THEREFORE ARE STATED GENERALLY.

First. The Supreme Court of the United States will determine for itself the question of the existence or non-existence of a contract in cases of this character, and whether the state law complained of impairs its obligation.

Grand Trunk Western Ry. v. South Bend, 227 U. S. 544;

Mercantile Trust Co. v. Columbus, 203 U. S. 311;

Northern Pacific Ry. v. Duluth, 208 U. S. 583.

In the latter case it was said (p. 590):

> "In cases arising under this clause of the federal constitution this court determines for itself whether there is a contract valid and

binding between the parties, and whether its obligation has been impaired by the legislative action of the state."

Second. The provisions of the federal constitution that no state shall pass a law impairing the obligation of a contract applies to a contract to which the state is a party as well as to contracts wholly between individuals.

Fletcher v. Peck, 6 Cranch, 87;
New Jersey v. Wilson, 7 Cranch, 164;
Davis v. Gray, 16 Wallace 203.

Third. No question of *regulation* under the police power is here involved. The police power may reasonably regulate but it cannot destroy a vested contract or right.

Owensboro v. Cumberland Tel. & Tel. Co., 33 Sup. Ct. Rep. 988.
Hawes v. Chicago, 158 Ill. 653, 42 N. E. 373.

The record shows that the sole reason for denying Economic Gas Company the right to lay its pipes in Sunset Boulevard at the time plaintiff in error was arrested was that the previously existing constitutional right to occupy the streets had been completely abrogated.

Fourth. The grant of a right to use the public streets of a municipality by laying down pipes and conduits therein in order to supply the city and its inhabitants with gaslight is not a mere

license, but is the grant of a property right which is assignable and taxable as such.

Owensboro v. Cumberland Tel. & Tel. Co., supra;

Boise Artesian H. & C. Water Co. v. Boise City, 33 Sup. Ct. Rep. 997;

Louisville v. Cumberland Tel. and Tel. Co., 224 U. S. 649;

New Orleans etc. R. R. Co. v. Delamore, 114 U. S. 501;

Mayor of Knoxville v. Africa, 77 Fed. 501.

Board of Mayor of Morristown v. East Tenn. Tel. Co., 115 Fed. p. 307.

Fifth. Although the grant contained in the California constitution was general in character and named no specific grantee or municipality, nevertheless when accepted by any person or corporation it became as to that person or corporation a special franchise or charter of equal effect as if the people of the state through authorised authorities had issued to that person or corporation a distinct franchise or charter.

Stanislaus County v. San Joaquin Canal and Irrigation Co., 192 U. S. 201;

Salt Co. v. East Saginaw, 13 Wall. 373.

Sixth. A right given by the constitution to lay down pipes and conduits in the streets of a city is constitutionally impaired by a subsequent change in the law which exacts a franchise or requires a

payment to the city of a rental for such use and occupation.

Boise Artesian H. & Co. Water Co. v. Boise City, (supra);
In re Johnston, 137 Cal. 115.

In the latter case, decided before the constitutional change, the Supreme Court of California in considering this constitutional grant under consideration said (p. 120):

> "The designation of 'damages and indemnity for damages' as the subject upon which the municipality may prescribe regulations in regard to laying the pipes is a limitation upon its authority over the matter, and a prohibition from prescribing regulations upon any other subject connected with the exercise of the privilege. When the sovereign authority of the state, either in its constitution or through its legislature, has created a right and expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality where such right is sought to be exercised or enjoyed to impose additional burdens or terms as a condition to its exercise. The constitution does not authorize the municipality to require a permit as a condition upon which the pipes may be laid in its streets, and its claim of a right to require a permit includes the right to refuse one, and the right to annex one condition to the exercise of the privilege implies the right to annex others, which may at least impair, if not in fact amount to a denial of its exercise. The provision that the work is to be done under the direction of the superintendent of streets gives all the protection for the use of the streets that could be obtained under a permit; and, under the

provision authorizing the municipality to prescribe regulations for damages and indemnity for damages, the city will be fully protected against any pecuniary loss or detriment."

Passing these settled principles we approach the disputed ground.

II.

THE CONSTITUTION CONTEMPLATED A SINGLE GRANT FOR THE PURPOSE OF SUPPLYING THE CITY AND ITS INHABITANTS WITH GASLIGHT, AND NOT A SERIES OF SEPARATE AND DETACHED GRANTS.

The substance of the opinion of the State Supreme Court on this phase of the case may be generally stated as follows:

The constitutional offer was a general one, and no provision was made for any method by which the offer might be accepted; therefore, the only means of manifesting such acceptance was the act of taking possession and occupying a street; the acceptance was not completed until this was done, and the public grant extended only to the streets actually so occupied and used.

This is to say that the intention of the people as expressed in their constitution was not to make a single grant for the general purpose of supplying a city and its inhabitants with gaslight but a series of separate and detached grants so that each time a new section of pipe was laid in a street there was created a new contract having no relation to

the contracts previously resulting or to the work already installed.

The language of the grant, the nature of the subject matter, and the decisions of the courts negative such a conclusion.

The constitution was not altogether general. It said:

> "* * * any individual, or any company *duly incorporated for such purpose* under and by authority of the laws of this state, shall * * * have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, *so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light*, * * * upon the condition that the municipal government shall have the right to regulate the charges thereof." (Italics ours in all quotations.)

The aim of the authors of this section manifestly was to authorize a grant of such character as would enable the grantee to introduce into and supply a city and its inhabitants with such necessary service. The words "so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light" define and indicate with certainty the compelling motive and object of the enactment. *The grant was designedly made co-extensive with the object sought to be attained.*

The purpose was to encourage private capital to invest in competitive water and lighting systems

so that the inhabitants of a municipality might be supplied with these necessities from as great a number of sources as possible. The rights granted were in no sense exclusive, and the vital principle was the competitive and not the monopolistic theory for public utilities. This not only appears from the clear language of the constitution, but it was emphasized by the State Supreme Court in the first case involving the section that came before it.

In *People v. Stephens*, 62 Cal. 209, it was said at page 234:

> " * * * And so with respect to the privilege granted by section 19 of article XI of the constitution of laying pipes in the public streets and thoroughfares of any city (where there are no public works owned and controlled by the municipality), so far as may be necessary for introducing into and supplying such city and its inhabitants with gas or other illuminating light or with fresh water. That privilege is expressly granted by the section of the constitution cited, subject to the direction of the superintendent of streets or other officer in control thereof, and under such general regulation as the municipality may prescribe for damages and indemnity for damages, and upon the condition that the municipal government shall have the right to regulate the charges thereof. The purpose of this provision was thus explained by the gentleman at whose instance it was inserted in, and became a part of the constitution: 'It gives to any individual, as well as to any incorporated company, the right to the use of the streets for laying down pipes for the supply of gas and water, or either. I think that the objection that was taken to the section as formerly introduced

was well taken—that it should not be limited to corporation; that any individual, for the public good, should have the right to use the streets for laying down pipes for supplying water or gas. *It is in the public interest that it should be conceded, and it prevents monopoly in any sense.* It also provides that the city authorities may make a regulation in relation to damages and indemnity; that is, that they may make a regulation requiring all work to be done under the supervision of the superintendents of streets, and also, if any damage should be likely to occur, they may, by security or otherwise, guard against it. * * * Then it provides that the city and county shall have the right to regulate the price to be paid by the inhabitants for the gas and for the water. This is also a necessary regulation, I think, against the abuses of monopoly. Now, in Los Angeles we have a gas company with a monopoly for twenty years, and several parties have endeavored to get the privilege for laying down pipes in the streets for the purpose of supplying the city and competing with this company, but the company has always had sufficient influence in the municipal government to prevent this being done, and this company has a prospect of exclusive right for twenty years to come. Now, I submit to the convention that this is a great abuse of public authority and that it ought to be corrected. We have, also, there, a water company that claims the monopoly, and the private individual who did succeed in laying down pipes and is to some extent supplying the city with water in opposition to the monopoly, is threatened constantly with suits and injunctions, and if this thing goes on we will have a monopoly, not only of water and gas, but of all domestic necessaries, and then we will have some company peddling it by the tin cupful. It is

> time this abuse was corrected, and, therefore, I offer this amendment'—which 'amendment' is the clause of the constitution now under consideration. (Debates Cons. Con., Vol. 2, p. 1075.)
>
> "We have quoted at length the remarks accompanying the introduction of the provision, for the purpose of showing that the members of the constitutional convention had distinctly put before them the evils intended to be remedied, and the purpose of the enactment; and thus informed, they adopted it."

With the general purpose of the section thus so clearly stated, it must be concluded that the people in endeavoring to carry out their object singularly failed to express their meaning if the language of the section employed means what the learned court below has now said it does mean, viz., that any investor who in reliance upon this grant had commenced to introduce a gaslighting system into a city could at any moment be halted in his work and prevented from completing that which he was invited to do, without compensation for the loss thus imposed and left with an expensive generating plant and the beginnings of a distributing system without customers.

We deny that the language of the section is capable of any construction other than that now claimed for it by plaintiff in error. Indeed it is not easy to even now suggest other language that would more clearly express such purpose. Therefore rules of construction such as that in public grants all doubts must be resolved against the

grantee, and that nothing passes by implication, have no place here. If there is no doubt, then there is no necessity of resorting to any rule of construction and the will of the people as written must be carried out. The grant must be now considered by this court in the light of the policy of the state as announced at the time the constitution was adopted and as frequently stated by the highest court of the state while it was yet in force and not in the light of the amendment of thirty years later which, as held by the state court, shows a disposition to retire from the competitive policy and go back to monopolistic control. The state may, no doubt, if it chooses, radically change a given policy, but it cannot do so at the expense of private individuals who in good faith have endeavored to carry out their enterprises under the former policy. Otherwise the constitutional guarantees would lose their meaning and contract and property rights be at the mercy of popular whim.

Nor are we here concerned with the *power* of the people to make this grant in such form and breadth as they saw fit. It takes its origin in the supreme law of the state which is subject only to the provisions of the federal constitution, and there are no provisions of the federal constitution which would prevent such a grant being as wide and liberal as might be thought proper.

Admitting, then, this authority and power in the people and reading the grant in the light of a pronounced and long established state policy, we claim

that it is unnecessary in arriving at the solution of this question to go further than to the simple and clear language of the constitution; that there is here no such limitation as that the grantee "shall have the privilege of using such of the public streets and thoroughfares as it may actually occupy while this law is in force," but that it is a grant of all the streets of the city that "may be necessary for introducing into and supplying the city and its inhabitants with gaslight."

If a specific franchise had been given in the name of the people of the state to Economic Gas Company in which that company were given the privilege of using the public streets of Los Angeles and laying down pipes therein, so far as might be necessary to supply the city and its inhabitants with gaslight, we ask what possible doubt of the meaning of the extent of the grant could have arisen? In such a case it would not, we assume, be denied that subsequent legislation could not impair the obligations of the contract or stop the work when partially completed. If such language used in a specific franchise would be free from ambiguity then a general grant in the same language must be equally clear for as noted it became when accepted by any particular company or individual a special franchise as to such grantee.

The answer of the learned court below was that in the case of the specific franchise there is a method provided for its acceptance, whereas in the consti-

tutional grant it may be accepted only by the occupation and use of the streets. Thus the solution of this important question of legislative policy is made to turn upon the narrow ground of the *method* of manifesting an assent to an offer. This objection could not have arisen if the constitution had said, we will say, that "the grantee must file an acceptance of the grant with the city council."

In such case if a formal document had been drawn in the name of the people of the state granting to Economic Gas Company these privileges, and the company had written on the document the word "Accepted" above its signature, *no greater obligations would have been imposed upon the grantee than were impliedly imposed when it availed itself of the constitutional privilege by commencing its work in a substantial manner in the streets of Los Angeles.*

The duty to furnish the service to all the inhabitants of the city would be an implied and not an express obligation in either event. Thus this grant was not one which by any possibility could be expressly accepted and, therefore, it must be assumed that its authors intended that the acceptance should be an implied one.

It is not necessary that a privilege or license to use the streets of a city for the purpose of supplying its inhabitants with these necessities be accepted *expressly* by the grantee. It is only necessary to ascertain the intention of the parties, and

the grantee, unless specifically required by the ordinance to accept it in writing, may do so by acting thereunder in a substantial manner. It was said in *Chicago etc. v. Town of Lake,* 130 Ill. 42, 22 N. E. 616 by the Supreme Court of Illinois that:

> "The privilege of the use of the public streets of a city or town when granted by ordinance, is not always a mere license and revocable at the pleasure of the municipality granting it; for it the grant is for an adequate consideration, and is accepted by the grantee, then the ordinance ceases to be a mere license, and becomes a valid and binding contract. *And the same result is reached where, in case of a mere license, it is, prior to its revocation, acted upon in some substantial manner, so that to revoke it would be inequitable and unjust.*"

That such franchise or grant may be accepted by acts performed by the grantee in reliance thereof is settled by the decision of this court in *City Ry. Co. v. Citizens R. R. Co.,* 166 U. S. 557. After holding that the city was estopped from revoking its franchise since the company had in reliance upon the action of the city in good faith invested its money, it was said (p. 568):

> "This ordinance is also attacked upon the ground that it was never formally accepted by the company. There is really nothing in this contention. No formal resolution of acceptance is necessary in any case, if the facts show an actual, practical acceptance by the company, or action which would be only explicable in case the amendment were accepted."

The ordinance referred to in this quotation was an amendment of a prior ordinance by which the

original franchise was lengthened from thirty years to thirty-seven years.

If it had been desired that the grant should be conditioned upon the completion of the system within a certain time or that it be confined to certain streets, or that the proposed route should be first approved by the city council after a plat thereof had been filed, all these and other conditions which are frequently inserted in franchises could have been made a part of this constitutional provision if the people had thought it proper. *But silence upon these requirements indicates that the people did not desire to thus limit the grantee;* that they believed it a wise policy to dispense with all these conditions and rely upon the right of the municipal authorities to regulate the rates.

The extent and liberality of the constitutional offer is free from doubt. That the state *intended* to give just such privileges as are now claimed by plaintiff in error is attested by a judicial history of many years. Such intention, we now submit, cannot be subverted by any technical construction of the manner or method by which the grant was accepted.

It would seem, however, that even from such technical viewpoint the extent of the *offer* could not under any rules for the construction of contracts, whether public or private, be determined by the extent of the *acceptance;* that if the grant is a single and indivisible grant, and be accepted at all, it must have been accepted as an entirety.

From the nature of the undertakings the framers of the constitution knew and must have had in mind that these public service systems could not be laid in detached sections, and that the pipes and conduits are necessarily parts of a single system radiating throughout the city from a single generating source and extending through an ever widening zone as the city develops.

If the grant here was to construct a street railroad along the streets and highways of a city "for the purpose of furnishing transportation to the inhabitants," and in reliance upon such grant a railroad company had commenced to place its rails, could such work be halted at any moment, and the value of the construction already done taken away by a repeal of the grant? Surely the rights which the company had evinced its intention of securing by completing its track should be as much protected as its right in the rails already laid, because unless completed it is not a railroad, *and it cannot supply the people of the city with transportation.* So in the case of a gas company, each pipe that is laid in the street is but a connecting link in the single system of distribution. The gas that is conducted therein is obviously not intended to supply only the consumers with whom house connections to this particular section of pipe can be made, but also to other consumers in more distant portions of the city.

Another illustration from a public utility to which similar rights were granted by this constitutional section may be pertinent.

The City of San Francisco and its inhabitants are supplied with fresh water by a corporation which brings the water from reservoirs and wells, situate at considerable distances from the city, and conducts it to smaller reservoirs on certain of the hill tops of the city. To reach these distributing reservoirs large main pipes have been laid through certain of the streets of the city. The city and its inhabitants cannot be adequately supplied with fresh water except by such method. Assume now that the company intending in good faith to avail itself of the constitutional grant had built these small distributing reservoirs inside the city and had laid large central mains to these reservoirs along certain of the city's streets, intending to build a distributing system by a net work of smaller pipes laid throughout the city. After the distributing reservoirs, and the connections therewith, have been so built and the reservoirs filled with water, the constitutional change takes place. The Supreme Court of California under its ruling must hold in such a case that the water company had no vested right to build this distributing system at all, and that by building the reservoirs and connections, as it had done, *it had manifested only the intention of accepting the constitutional grant to the extent of the streets occupied by such portion of the system as was already built. In other words, the constitutional grant only gave to the company the right to supply its own reservoirs with water, but not to supply the inhabitants of the city.*

Under the illustration given, the intention of the water company to supply the inhabitants of the city with water was manifested in as public and emphatic a manner as if a written contract to that effect had been executed. It had initiated and was carrying toward completion the obligations imposed upon it. To deprive it of the right to construct its distributing system is to take away everything of value and leave a privilege—which for many years had been deemed to be of such great value—an idle promise.

We therefore challenge the correctness of the conclusion of the court below that (p. 677):

> "* * * The only means whereby an effectual manifestation of acceptance can be made is the act of taking possession and occupying *the street* for the purpose allowed."

When Economic Gas Company, in pursuance of a general plan and design, had availed itself of the constitutional grant to the extent of laying more than thirty-three miles of pipe and had submitted to the regulation of its rates by the city authorities it surely had given a signal manifestation of its intention of accepting the entire grant and completing the system of which the portion so laid was a necessary and integral part.

The conclusion of the state court refuses to accept as evidence of intention to supply all the inhabitants of the city any fact or circumstance other than the physical laying down of the pipe followed by its use as a conduit for gas. If at

the very moment the repealing amendment became effective, a trench had been dug, the necessary pipe placed by the trench, and even the workmen actually engaged in placing the pipe in the trench, still as to that particular portion of the street no rights had vested because, forsooth, the company *had not manifested its intention of accepting the grant by actually occupying the street by a pipe or conduit through which gas had actually been furnished.*

That a grant of this character is not a piece-meal apportionment of the streets of the city but a single grant seems settled by the recent decision of this court in

> *Grand Trunk Western Ry v. South Bend,* 227 U. S. 544.

There a specific charter had been granted to lay a double track along a certain street of the City of South Bend. A single track was built in 1871. Thirty years later the company desired to place a second track upon the street in question, when it was met by a repealing ordinance of the city as to such second track.

It was held that the repealing ordinance was invalid, and impaired the obligation of the contract.

Upon the subject of the grant this court, speaking through Mr. Justice Lamar, said (p. 555-556):

> "It is said, however, that even if the city could not prevent the use of the rails already

laid, it could repeal so much of the ordinance as related to that part of the street on which the double track had not been actually built. *But this was not a grant of several distinct and separate franchises, where the acceptance and use of one did not necessarily execute the contract as to others not connected with the main object of the ordinance and not at the time directly within the contemplation of the parties. Pearsall v. Great Northern R. R.*, 161 U. S. 646, 673. *This franchise was single and specific, and when accepted and acted upon became binding,—not foot by foot, as the rails were laid—but as an entirety.* Here the company not only accepted the ordinance and constructed the road, but, relying on the franchise, acquired from the abutters by purchase or condemnation an 18-foot strip with a view of laying thereon a double track as the increase in business made that necessary. Subsequently it built the double track for a part of the distance and has not abandoned or forfeited the right to use the balance of the easement when needed for the discharge of its public duties as a carrier.

"*The ordinance passed in pursuance of the Indiana statute was an entirety. When accepted it became binding in its entirety.* If the city has the right to repeal the specific provisions of the contract, it has the like right to repeal the more general grant to lay a single track. If South Bend can do so, every other municipality having granted like rights, under similar ordinances, and affecting every line of railway in the country, can repeal the franchise to use double or single track. On the ground of congestion of traffic, the state's grant and command to operate a continuous road could be nullified by municipal action, to the destruction of great highways of commence, similar in their nature to the street itself. Such con-

> sequences, though improbable, are rendered impossible by the provision of the constitution of the United States prohibiting the impairment of the obligation of a contract by legislation of a state, whether acting through a general assembly or a municipality exercising delegated legislative power."

In *Africa v. Board of Mayor and Aldermen*, 70 Fed. 729, it was said, referring to the power of a municipality to revoke a franchise to use the streets of the City of Knoxville for a street railroad:

> "* * * It was not necessary, as the public good might require, and the business might justify, that a separate ordinance should be passed for each new street to be occupied as new streets might be established (p. 733).

And again, to the point that the repealing ordinance was invalid as to the rights on streets not actually occupied (p. 735):

> "* * * Indeed, the cases upon this subject could be accumulated to a great number, and it may not be out of place in this connection to say that the great number of cases in which it has become necessary for the courts to rule upon the question furnishes a somewhat suggestive lesson as to the freedom with which municipal legislatures in this country have undertaken to strike down enterprises which they were anxious to encourage in the first instance with liberal grants and large declarations of good faith. The able counsel for the defendants do not seriously controvert this rule, and do not assert that the attempt to repeal the ordinance would be good as against streets at the time occupied, their contention being that the ordinance is valid as to the streets which had not then been used. In re-

spect to this, I think it is only necessary to say briefly that no commercial railroad, and no street railroad of any considerable importance, is ever determined upon except as a system or plan, and it is certain in many or most instances that if, after a partial completion of the plan, the right to go further could be withdrawn by repeal of the franchise, it would render the system, so far as extended, of little value, and would operate widely as a destruction of property and rights in proportion to the progress of the work at the time of the withdrawal. It certainly would not be contended that a franchise to build a railroad between two cities could be repealed after the work is begun and before its completion; and in respect to a street railroad *I think it could hardly be maintained that, if a given number of streets are necessary to the operation of a successful plan or system, and a part of such streets have been entered upon and occupied, the right to use the remainder of the streets can be revoked.*"

The case last cited was reversed by the Circuit Court of Appeals for the Sixth Circuit, 77 Fed. 501, but upon the point that the city authorities had under the statute no power to make such a grant until the railroad company had filed a map showing the route sought. The power of the municipality was held to extend no further than this. Such considerations have no application to the case at bar.

In *Workman v. Southern Pacific R. R. Co.*, 129 Cal. 536, it appeared that the City of Los Angeles in 1872 had passed an ordinance granting to the defendant company a right of way in Alameda

Street. The company soon thereafter constructed a single track in the street, and twenty-one years later began to lay a double track thereon out of which this action arose. The court held that it was not necessary that the company make an immediate election of the mode in which it would avail itself of the grant and further said (p. 542):

> "* * * The purpose of the ordinance was to enable the company to carry into effect the objects for which its road was constructed, and to enable it, in the language of section 21, 'to reach an accessible point for a depot in said city,' and the right of way was granted thereby 'in and out of the city of Los Angeles' for the purpose of enabling it to 'pass through' the city to the terminus of its route, and 'to accommodate the traveling and commercial interests thereof.' Unless the company was expressly required by the ordinance to construct a double track in the first instance, if it would avail itself of that privilege, reasonable business prudence would justify it in postponing such construction until the increase of its traveling and commercial interests should demand it. At the date of the ordinance the road was not completed, and, like all business enterprises of that nature, its success was more or less problematical, and, in the absence of any limitation to that effect, the council must be deemed to have granted the right of way with the privilege to the company to construct a single track upon the street at the outset, and the continued right to construct an additional track thereon in the future whenever it should become desirable from the necessities or convenience of operating its road."

In *Louisville v. Cumberland Tel. and Tel. Co.*, 224 U. S. 649, this court had under consideration

a charter granted by the legislature of Kentucky to the predecessor in interest of the defendant in error. This charter read in part:

> "The said company may construct, equip and and maintain said telephone systems and exchanges, erect poles and string wires thereon, and operate its telephone lines over, along or under any highway, street or alley in the city of Louisville, with and by the consent of the General Council of said city."

The city council by ordinance consented to this grant which was accepted by the grantee company. The city council many years later endeavored to repeal these existing rights and to grant a new franchise to be sold to the highest bidder. It was claimed in behalf of the city that the franchise was revocable at the will of the general council since it was indefinite as to time. This court in denying this claim referred to cases in which it was held that ordinances giving exclusive or perpetual grants to street franchises were void because made in excess of the statutory power possessed by the municipality, saying that such decisions did not apply where a perpetual charter had been received not from the municipality but from the state of Kentucky. It was said further (pp. 663-664):

> "In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a

license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the state's purpose to secure a telephone system for public use. For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at will of the city and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter cannot be supported, either from a practical or technical standpoint.

"This grant was not at will, nor for years, nor for the life of the city. Neither was it made terminable upon the happening of a future event, but it was a necessary and integral part of the other franchises conferred upon the company, all of which were perpetual and none of which could be exercised without this essential right to use the streets. The duration of the public business in which these permanent structures were to be used, the express provision that franchises could be mortgaged and sold, the nature of the grant, and the terms of the charter as a whole, compel a holding that the State of Kentucky conferred upon the Ohio Valley Telephone Company the right *to use the streets to the extent and for the period necessary to enable the company to perform the perpetual obligation to maintain and conduct a telephone system in the city of Louisville.*"

The logic of the decision of the court below in this case necessitates the extent of the grant being confined to the exact limits of the prior occupation. The purpose for which the partial construction was made may not be considered nor the expansive character of the business. Thus if it became necessary to substitute a larger conduit or electric pole for those in place, the change could not be made

because the rights of the company had become vested only as to the particular extent of the street previously occupied. Such conclusion, of course, could quickly render obsolete and useless even that portion of the system already installed, and would thus indirectly take away the value of property which could not be taken away directly. Such conclusion, moreover, is directly opposed to a decision previously rendered by the District Court of Appeal of California in the case of *Merced Falls Gas Co. v. Turner,* 2 Cal. App. 720. In this case, which arose prior to the constitutional change, it was held that the city authorities had under their implied authority to make needful and reasonable regulations touching the use of streets the power to compel the company to change the position of certain of its electric light poles. The court said (p. 723):

> "* * * But the constitution, in providing for the exercise and enjoyment of the franchise owned by appellant, did not grant an absolute, indefeasible right or easement in the particular spots of earth where its poles were planted originally, nor does the grant contain a hint that the superintendent of streets, or other officer in control thereof, exhausted his jurisdiction or power to direct or control the use of the streets by appellant, when the poles were located in the first instance."

And again (p. 724):

> "* * * The original location of the poles by permission of the city authorities created no absolute, indefeasible right, or irrevocable license, to have each pole remain at the particular spot for all time; and it is well settled that

lapse of time creates no prescriptive right to public property."

That grants of this character are made with a view of use and occupancy as future demands may require, and that they are not limited to the particular portions of the streets which the grantee may elect at the outset to occupy, has been held in many other cases.

Merchants Trust Co. v. Denver, 161 Fed. 769;
Peoples Ry. Co. v. Baldwin, 14 Phila. 231;
Chicago etc. Ry. Co. v. Eisert, 127 Ind. 156;
White v. Chicago Ry. Co., 122 Ind. 317;
Indianapolis Cable Co. v. Citizens Street Ry. Co., 127 Ind. 369.

III.

THE OBLIGATION OF THIS CONTRACT WAS IMPAIRED BY THE SUBSEQUENT LEGISLATION BECAUSE THE VALUE OF THE CONSTRUCTION ALREADY MADE BY ECONOMIC GAS COMPANY IN THE STREETS OF LOS ANGELES WAS THEREBY LESSENED.

The petitioner in averments which are not traversed has shown that the company has gone forward with its construction under the general plan of serving all sections of the city, and that if it be now restricted from serving only those consumers who may be reached from the pipes and conduits already laid, a constant loss of more than two thousand dollars per month will result to the company.

We take it to be well settled by decisions of this court that any subsequent legislation which deprives a person of the *use* or *enjoyment* of a contract right to the full extent to which he would have been entitled had the repealing law not been passed impairs the obligation of his contract.

In *Bartemeyer v. Iowa,* 85 U. S. 129, Mr. Justice Field in a concurring opinion said:

> "* * * The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Any act which declares that the owner shall neither sell it no dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation by any state the fourteenth amendment affords protection."

In *United States v. Lynah,* 188 U. S., it was said at page 469:

> "'The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.
>
> "'It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it

> shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.' "

And *Pumpelly v. Green Bay Company*, 80 U. S. 166, 179, held:

> "But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken."

Of course, this use and enjoyment is subject to such regulations as may be imposed by the police power. But, as already noted, we are in no wise concerned in this case with such exception.

This court, in *Pearsall v. Great Northern Ry.*, 161 U. S. 646, had before it the consideration of facts which are pertinent to the question now under discussion. Although it was there denied that the subsequent legislation had impaired the obligation

of the charter rights of the railway company, it was, nevertheless, said (p. 661):

> "Subsequent cases have settled the law that, wherever property rights have been acquired by virtue of a corporate charter, such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts, and beyond the reach of destructive legislation. * * *
>
> (p. 673) "As applied to railroad corporations, it may reasonably be contended that the term (*i. e.* vested right) extends to all rights of property acquired by executed contracts, *as well as to all such rights as are necessary to the full and complete enjoyment of the original grant, or of property legally acquired subsequent to such grant.* If, for example, the legislature should authorize the construction of a certain railroad, and by a subsequent act should take away the power to raise funds for the construction of the road in the usual manner by a mortgage, or the power to purchase rolling stock or equipment, such acts might perhaps be treated as so far destructive of the original grant as to render it valueless, although there might in neither case be an express repeal of any of its provisions. *Sala v. New Orleans*, 2 Woods 188.
>
> "But where the charter authorizes the company in sweeping terms to do certain things which are unnecessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked, if a possible exercise of such power is found to conflict with the interests of the public."

The intention to extend this lighting system, and particularly to lay the pipes on Sunset Boulevard, was fairly shown by the uncontradicted averments of the petition "to have been directly and immediately within the contemplation of the parties." When the streets were occupied by that portion of the system now in place an extension of such system was obviously a right necessary "to the full and complete enjoyment of the main object of the grant". The main object of the grant was to enable any individual or company incorporated for that purpose to serve the city and its inhabitants with illuminating light wherever within the corporate limits of the municipality the customer might require such service. The work proposed to be done had no such uncertain and shadowy relation to that already done as the right asserted by the railway company in the *Pearsall* case.

The privilege of laying pipes in the street was of itself valueless and worse than useless to both the municipality and the company. The right to supply consumers through such pipe and collect revenue therefor was the "obligation" of the contract imposed upon the grantor. Since the pipe and plant already installed can be used without extra expense and was laid with the intention to supply other and more remote consumers—any legislation which prevents the company from so availing itself of such use impairs that obligation.

We may indeed accept the statement of the Circuit Court of Appeals for the Eighth Circuit in *City*

of Denver v. Mercantile Trust Company, 201 Fed. 790, which states the rule as strongly as possible against the grantee. It was there said (p. 808):

> "Again it is said on the part of the city that the ordinance being a blanket one, granting to the railway company the right to construct its road upon any and all of the streets of the city as it might in the future elect or choose to do, is void. A consideration of this question leads us to the conclusion that every grant of the character in question must be reasonable with respect to future public rights; that a grant that is exclusive in its character, or a grant in perpetuity to all of the streets which the grantee may from time to time in the future see fit to occupy, is unreasonable and unenforceable *in the absence of express legislative authority.*"

Even under such a principle, rights such as the Economic Gas Company are endeavoring to enforce will be protected, for the court, continuing, said:

> "Such provision, however, does not render the entire grant void. It is a valid contract as to all streets which are actually occupied or *in contemplation of occupancy, pursuant to a system adopted with a view of completion in the immediate future.*"

Nor may it be said that this was a gratuitous grant without consideration to the municipality or the state and without obligations imposed upon the grantee. To the contrary there are obvious and important obligations which any grantee availing itself of these rights must perform. They must submit to the municipal authorities the right to regulate their rates, a requirement which, as noted by

Judge Ross in the *Stephens* case, was thought by the framers of the constitution as in itself a sufficient protection to the municipality. There is also an implied obligation on the part of the grantee to extend its system.

In *Des Moines Street R. R. Co. v. Des Moines Broad Gauge Ry. Co.*, 73 Ia. 513, 33 N. W. 610, the Supreme Court of Iowa, in construing a franchise for a street railway, said:

> "The majority think that the ordinance took effect as a contract in relation to all the streets at the time of its written acceptance by the plaintiff's assignor, which it appears was made soon after the passage of the ordinance; and that the public rights are secured by an *implied* obligation on the part of the company, acting under the ordinance to hold itself in readiness at all times to construct and operate so much track, and upon such streets, as the public convenience may require, to be determined by the city council in the exercise of a reasonable and proper discretion,—the company to have a reasonable time to comply after the requisition shall be made."

This concerned a special franchise which did not, however, contain any express obligation on the part of the company to construct or operate its railroad. The court finds this obligation to be one *implied* from the nature of the grant.

In *People ex rel. Woodhavens Gaslight Co. v. Deehan*, 153 N. Y. 528, 47 N. E. 787, the Court of Appeals of New York had before it a question identical with that under discussion. There the municipal au-

thorities in 1871 had granted the relator permission to lay its conduits in the public streets of the town of Jamaica. In 1894 a portion of the town of Jamaica was incorporated into the village of Richmond Hill, but still remained a part of the town. The trustees of the village by ordinance enacted that no person should dig in or upon a street without a permit from the street commissioner. The relator being refused such permit applied for a peremptory writ of mandamus. The court said (p. 531):

> "* * * This grant, by its terms, is plainly co-extensive with the limits of the town, and was not confined to any particular street, highway, or other local division."

And holding that the relator should not be divested of the right granted to it by the permission of 1871, concluded (p. 532):

> "The learned court below reversed the order in favor of the relator, solely upon a construction of the grant which, we think, is altogether too narrow. It was held that the consent of the town authorities applied only to streets and highways then existing, and not to streets and highways thereafter opened or used, and that since that part of Broadway in the village, newly incorporated from the town, did not exist as a street or highway when the grant was made, the right to lay conductors in that street had never been acquired by the relator. The rule that public grants are to be construed strictly against the grantee means simply that nothing shall pass by implication except it be necessary to carry into effect the obvious intent of the grant. *But the obvious intention of the parties, when expressed in plain language, cannot be ignored in a public any more than*

in a private grant. A construction that would lead to false consequences or unjust or inconvenient results, not contemplated or intended, should be avoided in a grant as well as in a statute.

"It is well known that business enterprises such as the relator is engaged in are based upon calculations of future growth and expansion.

"*A franchise for supplying gas not only confers a privilege, but imposes an obligation, upon the corporation to serve the public in a reasonable way.* The relator is bound to supply gas to the people of the town upon certain conditions and under certain circumstances, and it would be most unjust to give such a construction to the consent as to disable it from performing its obligations. It cannot reasonably be contended that the relator is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when made. *When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as in the old.* Such a grant is generally in perpetuity or during the existence of the corporation, or at least for a long period of time, and should be given effect according to its nature, purpose, and duration. There is no good reason for restricting its operation to existing highways unless that purpose appears from the language employed. It is not claimed that any such limitation was expressed, and none can be implied from the nature of the case. The language of the consent confers the right to place the conductors in the streets,

upon compliance with reasonable regulations, not only as the streets then existed, but as subsequently enlarged or changed. That is what the grant contemplated when made, and such is the fair meaning of the language used. The order of the appellant division should be reversed and that of the special term affirmed, with costs."

Vid. also

Wyman on Public Service Corp., sec. 281;

Pocatello v. Standley, 7 Idaho 155, 61 Pac. 518;

Hovelman v. Kansas City R. R. Co., 79 Mo. 632.

This implied obligation is emphasized by the provision of the California Civil Code already quoted, section 629, which provides severe penalties if the public utility fail to extend its service.

If the principle announced in the *Deehan* case be followed, there was an implied obligation on the part of Economic Gas Company to extend its mains and serve as many consumers of gas as it reasonably could. If it failed to perform this obligation its grant could be rescinded. Section 1689 of the California Civil Code provides:

"A party to a contract may rescind the same in the following cases only:

"* * * * *

"2. If, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part."

By such rescission the rights of the company would be set aside not only as to new streets but

also as to those already occupied. This remedy is a sufficient protection against any possible abuse of the grant.

The State Supreme Court, in reaching its conclusion that the petitioner had no rights of any character after the constitutional change in streets not previously occupied by it relies largely upon certain prior decisions of that court. These cases are:

Stockton Co. v. San Joaquin Co., 148 Cal. 313;

Western Union Tel. Co. v. Hopkins, 160 Cal. 106.

In these cases, however, the court was not concerned with the question involved here. It was called upon to decide if this right granted by the constitution was assessable for the purposes of taxation in the county where the right was exercised.

In the *Stockton* case, it was held that the assessment imposed by the authorities of the County of San Joaquin, in which county the franchise was exercised, was valid. It was stated in general terms that the franchise is only acquired when the pipes and conduits are laid in the streets of the city. But it was not decided, nor was it necessary to decide, that this franchise right did or did not extend to unoccupied streets. The value or extent of the franchise right was not before the court.

In *Western Union Tel. Co. v. Hopkins* (supra),

the State Supreme Court held that the right granted by Section 536 of the Civil Code to use the streets of a municipality for the maintenance and operation of a telegraph system was assessable and taxable as such "to the extent at least to which its system was constructed therein at the time of the adoption of the section." The court was not called upon to decide the extent of the grant, and the language used was obviously intended to avoid the appearance of so deciding.

IV.

THE CONSTRUCTION PLACED UPON THIS CONSTITUTIONAL PROVISION BY THE STATE SUPREME COURT TAKES AWAY A LARGE CONTROL BY THE MUNICIPALITY OVER THE PUBLIC SERVICE CORPORATION AND THUS DEFEATS THE PURPOSE OF THE GRANT.

One is impressed that the motive impelling the public authorities to oppose the effect here urged for the constitutional grant is the fear that this is a unilateral contract imposing no obligation upon the grantee, a grant which may be utilized to as great or little extent as the grantee may elect. That by this grant these rights in the public highways would be given away for all time without consideration or corresponding obligations on the part of the utility company.

We boldly assert that not only under our construction is there assumed by the grantee the ob-

ligation to comply with the purpose of the grant by extending its service but that *the very consequences so feared must ensue if the contrary construction be the true one.*

In any regulation or control by the municipality over the public utility the latter's franchise must be regarded as an entirety. Any other construction must result in abrogating the control by the city over the service and thus defeating the express object of the grant. For not only must the city be without power, under the theory that this is a partial grant, to compel the company by mandamus or other proper remedy to extend its service, but it also cannot prevent the discontinuance of any service already installed that may prove unprofitable. This follows from the nature of such regulation. A company operating under a single franchise cannot discontinue its service on any particular part of its system which considered by itself is unprofitable because the operation of the system as a whole may show a profit.

Atlantic Coast Line v. N. Car. Corp. Com'n.,
206 U. S. 1.

In this case this court held that an order of the Carolina Corporation Commission, requiring the railroad company to readjust its schedule for the arrival of a certain train, did not invade any constitutional right of the railroad company, although the change necessitated the operation of this train at a loss, since the regulation of the

utility must be considred as a whole. It was said (p. 27):

> "* * * As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance."

A public service corporation having begun the exercise of its franchise, its duty to properly serve the public thereunder is recognized and enforced. Mandamus will lie to compel the performance of this public duty.

Savannah Canal Co. v. Shuman, 91 Ga. 400, 17 S. E. 937;

Union Pacific R. R. Co. v. Hall, 91 U. S. 343.

If this provision of the California constitution did not create a single franchise for the use of all the streets of the city, but a series of detached grants which only conferred vested rights upon the company from time to time as the various sections of the work were laid in the streets, the city can no longer regulate this public service. Its power of regulation rests fundamentally upon the fact that the grantee is operating under a franchise. If the cost of service in any particular locality, or to a single consumer even, be unprofitable, the company under the ruling of the court below may discontinue that service and the public authorities may not prevent such discontinuance since the

financial returns of the company from the particular grant so sought to be abandoned must be considered and not the returns from a franchise which permitted the company to operate throughout the city. An equally difficult situation must result when the city proceeds to exercise the power given it by this section of the constitution to regulate the charges. These charges must be uniform throughout the city and for all public utilities furnishing the same service. If the cost of a particular service in a sparsely settled portion of the city be considered by itself, the rates so fixed would always be confiscatory. No public service corporation can prevent some special branches of its service being operated at a loss. In such a case the rates are prevented from being considered confiscatory by setting off the cost of this unremunerative service against the total returns received from the exercise of the franchise. If the Economic Gas Company has no present right to extend its system so that it may profitably utilize the expensive preliminary work constructed under the expectation of serving all the people of the city, then rates would be as to that company confiscatory, although possibly not so as to another corporation that had succeeded prior to the constitutional change in extending its service throughout the city.

In any proceeding in which Economic Gas Company might claim that it was being deprived of its property by reason of these confiscatory rates, the city could not defend upon the ground that

the same rates would be fair and equitable to a corporation that had the opportunity of serving all the consumers of the city. Thus, although the constitution obviously intended that all persons and corporations that availed themselves of this grant in the same city should be upon the same plane of equality as concerned the fixing of rates, still if it be now the law that the extent of territory that may be served by one corporation under this grant is greater than the territory served by another, this equality cannot exist.

These suggested consequences of the ruling of the court below point to the conclusion that any construction that results in giving to one corporation the right to returns from a whole city and to another the right to returns from only a limited portion of that city must destroy the fundamental basis of equality upon which it was intended that all grantees should stand when these charges were fixed. The very power to fix rates applying equally to all within the city must presuppose that the parties whose rates are so fixed *have equal rights from the public.*

The municipalities of California are not without a concrete and signal illustration of the consequences that must result from a construction that limits the public utility to the streets occupied prior to the constitutional change. In the case of *August Lukrawka et al. v. Spring Valley Water Company*, decided December 11, 1912, reported in Volume 15, California Appellate Decisions, page 793, in the Dis-

trict Court of Appeal for the First Appellate District (a court over which the State Supreme Court has the power of revision), the petitioners sought a writ of mandamus to compel the defendant public utility to extend its water mains in San Francisco and supply petitioners with water. The petitioners alleged that in order to do so, it would be necessary that the respondent extend its mains for a considerable distance in and upon streets not previously occupied by it.

The court upon a review of the authorities reached the conclusion that (p. 797):

> "* * * It is obvious that the legal obligation arising from the charter and franchise to supply the community generally was the underlying principle upon which in all of the cases cited by counsel for the petitioners the water companies were compelled to render the service demanded. * * *
>
> "Upon a review and a careful consideration of all of the authorities bearing directly and indirectly upon the subject under discussion, we are strongly of the opinion that it is the law that a water company, *committed by its charter to the public service, is in duty bound to serve the whole public; and that when necessary to such service the company's existing mains must be gradually extended so as to keep pace with the growth of the community which the company has undertaken to serve.*"

But having said that if this were the only phase of the question involved, the court

> "* * * would have but little difficulty, and less hesitation, in holding that when measured

> and tested by the constitutional and statutory law of this state as it existed when the respondent was organized and chartered, the petitioners' complaint in the present case states a cause of action for the relief prayed for",

the learned court reached the conclusion that solely on account of the constitutional change, as it was construed by the Supreme Court in the case at bar, the respondent company could not be compelled to extend its mains.

It was said that since it was not alleged that the respondent company had obtained a specific franchise to use the streets necessary for the requested extension, it could not be compelled by mandamus to serve the petitioners. After quoting extensively from the decision of the Supreme Court in the Russell case, the Court of Appeal concluded:

> "[2] It will thus be seen that public service corporations have no longer any legal right to use the streets of a municipality which they did not occupy prior to the constitutional amendment of 1911, and that such corporations may now extend their service into new territory in and along the streets of a municipality only upon securing a franchise from the municipality for that purpose.
>
> "The present action is based apparently upon the theory of the grant of a franchise to and its acceptance by the respondent in the streets referred to; and the evident purpose of the action is to compel the performance of an obligation arising by operation of law out of such franchise. This being so, it necessarily follows as a matter of pleading that the petitioners must plead rather than presume the

existence of the franchise relied upon to support the action before they will be entitled to the relief prayed for.

"In this behalf it affirmatively appears from the allegations of the petition that the respondent has never extended its mains into the streets upon which the petitioners reside, and nowhere in the complaint is there to be found an allegation that the defendant has ever been granted a franchise by the municipality to occupy and use such streets.

"The omission of such an allegation was fatal to the complaint for the reason that the constitutional amendment in question, under the interpretation given it by the supreme court in *Ex parte Russell, supra,* provides in effect that no person or corporation may operate a public service in the streets of a city without first 'obtaining the privilege from the city by a grant specifying the conditions which it chooses to prescribe.' Clearly under the rule thus declared the respondent in the present case could not, even if it desired to do so, assert any right to the use and occupancy of the several streets in question here until it first procured the permission of the city so to do; and it is equally clear that until such permission is obtained it cannot be said that the respondent has a franchise in or any legal right to use and occupy such streets.

"Manifestly the respondent cannot be compelled by mandamus to do that which as yet it has no legal right to do, and for this reason the demurrer was properly sustained.

"The judgment appealed from is affirmed."

(A rehearing in this case has been granted by the State Supreme Court and it is now pending before that court for decision.)

It is submitted that the difficulties encountered in the case last cited, and other equally perplexing situations, must necessarily arise in every municipality in the state, since in all of them the streets have been more or less utilized by public service corporations under the constitutional grant. If this grant be considered as a single franchise coextensive with the offer contained in the constitution, and with the object sought to be attained thereby, these difficulties could not arise.

V.

THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED AND THE PRISONER DISCHARGED.

WARREN GREGORY,
W. H. CHICKERING,
Of Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 415.

ROBERT RUSSELL, PLAINTIFF IN ERROR,

vs.

CHARLES E. SEBASTIAN, DEFENDANT IN ERROR.

CLOSING BRIEF FOR PLAINTIFF IN ERROR.

OSCAR A. TRIPPET,
WARREN GREGORY,
GARRET W. McENERNEY,
Of Counsel for Plaintiff in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 415.

ROBERT RUSSELL, PLAINTIFF IN ERROR,

vs.

CHARLES E. SEBASTIAN, DEFENDANT IN ERROR.

CLOSING BRIEF FOR PLAINTIFF IN ERROR.

I.

In order that we may bring out clearly the only matters here in issue it is desirable to point out that certain important questions which frequently arise in franchise cases are not presented by this case.

This we may do briefly as follows:

(*a*) No question of police power is involved.

(*b*) No question of the reserved right to alter, amend or repeal is involved.

(*c*) The power of the authority granting the franchise is not called in question.

(*d*) There is no provision of the constitution of California and, if it were of any importance, no law of California, general or local, State or municipal, limiting the duration of franchises acquired under section 19 of article XI of the constitution as it existed from 1879 to 1911.

(*e*) No exclusive franchise is or ever has been claimed by the Economic Gas Company.

Let us briefly refer to these matters.

(*a*) *No question of police power is involved.*

It is admitted that the Economic Gas Company has complied with all of the police regulations of the city of Los Angeles, and its only offense (and that of its employee, the plaintiff in error) was that it attempted to exercise a franchise which the local authorities of Los Angeles claimed that it did not possess, namely, a franchise to lay its mains in the streets of the city. In other words, the gas company was attempting to exercise prerogative power (California *vs.* Central P. R. R. Co., 127 Cal., 1, 40), and for attempting so to do without the franchise insisted upon by the local authorities of Los Angeles, its employee, the plaintiff in error, was arrested and held in custody at the time the writ of *habeas corpus* was sued out in the Supreme Court of California.

It is thus to be seen that no question respecting any police regulations can arise in the case. Indeed, it was pointed out by this court in Pomona *vs.* Sunset Telephone Company, 224 U. S., 330, 342, 343, that the constitutional amendment of 1911 gave the local authorities powers of control which "are not to be confined to police powers," and this court added:

> "If the municipal corporation does not see fit to establish the public works itself it may let others do it; but its power to impose conditions excludes the notion that the constitution alone is a grant to others of a right to occupy the streets without its consent."

Again, the decision of the Supreme Court of California here under review expressly holds that it is within the power of the municipalities to require or not to require franchises as a condition to the occupation of streets, and that the ordinance of Los Angeles requiring a franchise was valid.

We now pass to the next point.

(*b*) *No question of the reserved right to alter, amend or repeal is involved.*

There is no provision in the constitution of California reserving any power to revoke, alter or amend the grants made by section 19 of article XI of the constitution of California as it existed from 1879 to 1911.

It is therefore clear that the question of a reserved right to alter, amend and repeal does not arise.

(*c*) *The power of the authority granting the franchise is not called in question.*

No question can possibly arise respecting the power to make the grant dealt with in section 19 of article XI of the constitution, for that grant is made by the people in their sovereign capacity.

(*d*) *There is no provision of the constitution of California and, if it were of any importance, no law of California, general or local, State or municipal, limiting the duration of franchises acquired under section* 19 *of article XI of the constitution as it existed from* 1879 *to* 1911.

In Boise Water Company *vs.* Boise City, 230 U. S., 84, the court had occasion to say, in dealing with a grant to lay water pipes in the streets of the city, that—

> "There is no limitation in the general law of the State, nor in the charter of the city, as to the duration of a contract granting an easement in the streets for that purpose, unless it be found in," etc.

In view of this inquiry made in the case just cited, we deem it appropriate to call attention to the fact that there is no provision of the constitution of California and, if it were of any importance, no law of California, general or local, State or municipal, limiting the duration of franchises acquired under section 19 of article XI of the constitution as it existed from 1879 to 1911.

(e) No exclusive franchise is or ever has been claimed by the Economic Gas Company.

It is obvious that no exclusive franchise could be obtained under section 19 of article XI of the constitution of California as it existed from 1879 to 1911; but inasmuch as the question of whether a franchise is or is not exclusive frequently plays an important part in franchise cases it has been deemed appropriate expressly to mention the fact that no question of an exclusive franchise is here involved.

We pass now to our next subject of consideration.

II.

It is not denied that in 1909 the Economic Gas Company, here represented by the plaintiff in error, acquired, and that it now holds, a franchise to supply gas within the city of Los Angeles, and, to that end, to occupy streets of that city with its mains.

From the time of its adoption in 1879 until the amendment of 1911 the constitution of California (article XI, section 19) provided that,

> "* * * any individual, or any company duly incorporated for such purposes under and by authority of the laws of this State, shall * * * have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas light or other illuminating light, * * * upon the condition that the municipal government shall have the right to regulate the charges thereof."

It is not denied that in 1909 the Economic Gas Company accepted the offer contained in the constitutional provision just quoted.

Upon such acceptance the gas company acquired a franchise to supply gas within the city of Los Angeles and to that end to occupy the streets of that city with its mains.

The Supreme Court of California has uniformly so held:

People *vs.* Stephens, 62 Cal., 209.
Pereria *vs.* Wallare, 129 Cal., 397.
In re Johnston, 137 Cal., 115.
Denninger *vs.* Recorder's Court, 145 Cal., 629.
Stockton Gas & Electric Company *vs.* San Joaquin County, 148 Cal., 313.
Matter of Russell, 163 Cal., 668.

In People *vs.* Deehan, 153 New York, 528; 47 N. E., 787, all that the local authorities did was to pass a resolution whereby they consented

> "that the Woodhaven Gas Light Company may have the power, and the same is hereby conferred upon and granted to them, of laying conductors for conducting gas in and through the public streets and highways of said town of Jamaica."

It was decided therein in a very important opinion, much in point here, that upon acceptance of this privilege by the gas company a franchise arose, and it was held that the consent having been acted upon by the gas light company, the company acquired a franchise not only in the then existing streets and highways of the town, *but in all streets which might subsequently exist therein whether through change or alterations in old streets or by the opening of new streets.*

The case is cited with approval by this court in Illinois Central Railroad Company *vs.* Chicago, 176 U. S., 646, 666.

In Boise Water Company *vs.* Boise City, 230 U. S., 84, a franchise was granted by an ordinance which provided that

> "H. B. Eastman and B. M. Eastman and their successors in interest in their water works, for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water pipes in, through and along and across the streets and alleys of Boise City, under the surface thereof."

It would seem that the authorities cited put the proposition now in hand beyond the realm of debate, and indeed it is to be so taken, for it is said in the brief for defendant in error, page 72:

> "It is not contended by defendant in error that the change in the constitution can disturb the Economic Gas Company's rights in the streets used previous to the amendment."

In other words, the position of the defendant in error has to do with the nature and extent of the franchise, but not with its existence, and, so far as the nature and extent of the franchise are concerned, we plan to reach a consideration of those questions farther on.

We may therefore pass to our next point.

III.

Once it is conceded that the Economic Gas Company possesses a franchise, it necessarily follows that it must possess the precise franchise offered in section 19 of article XI of the constitution of California, because the acceptance of a franchise must conform to the offer thereof, and such an offer can only be accepted in toto or rejected altogether.

We have already shown (in our second point) that it is an undenied proposition in this case that the Economic Gas Company acquired in 1909, and now holds, a franchise to supply gas within the city of Los Angeles.

As will ultimately appear, this case must turn upon the question of what franchise was offered in the constitution, and with that in view we here invoke the rule that the acceptance of a franchise must conform to the offer and that the offer can only be accepted *in toto* or rejected altogether. This rule applies both to the acceptance of corporate charters and to the acceptance of franchises.

The rule with respect to the acceptance of corporate charters is set forth in 7 A. & E. Encycl. of L., 2d edition, 660, as follows:

> "When a charter is granted, whether it be one of creation or an amendment to the charter of a pre-existing corporation, it must be either accepted or rejected as offered and without condition, and in accepting the privileges conferred the grantee will be required to perform the conditions imposed.
>
> "When an act of incorporation is first passed it is optional with the corporators whether they will or will not take the benefit of it, but after they have made their election by executing the powers granted under the charter, then the duties imposed attach, from which the incorporators cannot be discharged otherwise than by a seizure of the franchise into the hands of the government, or by a repeal of the act with their assent."

The reason for this rule is thus stated:

> "There are, indeed, to be found some expressions of judges in former times importing that a corporation might accept part of a charter and reject the remainder; but of late times all judges have been of opinion that that is not open to a corporation; otherwise a corporation might reject the obligation which was imposed, and accept the benefit which was conferred upon them."
>
> Rex *vs.* Westwood, 7 Bing., 1; 20 E. C. L., 11, per Tenterden, C. J.

The same rule applies with respect to franchises, and the acceptance thereof must be of the franchise as an entirety.

Collins *vs.* Amsterdam St. R. R. Co., 76 N. Y. App. Div., 249, 252, and cases therein cited;

Brooklyn R. R. *vs.* Long Island R. R., 72 N. Y. App. Div., 496;

Detroit *vs.* Detroit City Ry. Co., 37 Mich., 558;

Canastota Co. *vs.* Newington Tramway Co., 69 Conn., 146;

People *vs.* Albany R. R. Co., 24 N. Y., 261, 263.

IV.

It is no impeachment of the extent of the franchise that all rights conferred thereby are not exercised at once.

Grand Trunk Co. *vs.* City of South Bend, 227 U. S., 544;

Workman *vs.* S. P. R. R. Co., 129 Cal., 536, quoted from in Mr. Gregory's brief, pp. 31, 32;

City of Los Angeles *vs.* S. P. R. R. Co., 159 Cal., 363, 108 Pac., 65.

V.

It is the established rule that the grantee of a franchise to furnish water or artificial light to a municipality and its inhabitants is in duty bound by contract to serve the whole public, and when necessary, having regard to the reasonable circumstances of the case, gradually to extend its plant so that the municipality and all of its inhabitants may be so served.

In People *vs.* Deehan, 153 N. Y., 528 (cited with approval by this court in Illinois Central Railroad Company *vs.* City of Chicago, 176 U. S., 646, 666, and quoted from in Mr. Trippet's brief in this case, pp. 48 to 51), speaking of the gas-light franchise quoted in point II of this brief, the Court of Appeals of New York said:

> "A franchise for supplying gas not only confers a privilege, but imposes an obligation, upon a corporation to serve the public in a reasonable way. The relator is bound to supply gas *to the people of the town* upon certain conditions and under certain circumstances, etc."

In the case just cited it was decided that a company had the right to extend its mains to keep pace with the growth of its business—followed in 176 U. S., 666—and the extract from the opinion of the Court of Appeals of New York, just made, has no other meaning than that it is ***the duty*** of a company so to do.

The precise proposition here in hand is laid down in Lukrawka *vs.* Spring Valley Water Company, 15 Cal. App. Dec., 793 (fully quoted from in Mr. Gregory's brief, pp. 51 to 54), the syllabus of which reads as follows:

> "A water company, committed by its charter to the public service, is in duty bound to serve the whole public, and when necessary to such service, the com-

pany's mains must be gradually extended so as to keep pace with the growth of the community which the company has undertaken to serve."

The case from which quotation has just been made was a proceeding in mandate to compel the water company to extend its mains. The application for the writ was denied upon the ground that by the amendment of section 19 of article XI of the Constitution of California in 1911, as interpreted by the Supreme Court in the case now in hand, the water company had no franchise to extend its mains, and that obviously mandamus would not lie to compel it to lay mains in a territory in which its franchise did not operate—or in a territory beyond what is spoken of in some of the decisions as "its franchise limits."

In other words, the District Court of Appeal of California for the First District decided that, prior to the amendment of 1911, it was the duty of the water company to extend its mains throughout the entire city to keep pace with the needs and growth of the community.

The writ of error in this case was sued out the very day of this decision by the District Court of Appeal for the First District of California, namely, December 11, 1912. In February, 1913, the Supreme Court of California ordered a transfer of the case from the District Court of Appeal to itself for decision; it was argued and submitted in July last, but no decision has come down.

Dooley *vs.* People's Water Company, No. 442, was decided by the Railroad Commission of California, December 3, 1913. This case was an application to compel a water company operating in Berkeley to extend its mains. The railroad commission, following the decision of the District Court of Appeal, held that but for the amendment of 1911 it would have been the clear duty of the water company to make the extension, and it (the railroad commission) thereupon ordered—

> "that People's Water Company be and the same is hereby directed, as soon as the city authorities of Berkeley will permit the use of the extension of Keith avenue for the purpose of installing a water main thereon, to extend, with reasonable diligence, a main * * * to serve the premises of Dooley, Grebs * * * and thereafter to serve them with water at the regular rates without additional expense."

The rule for which we are contending is laid down respecting railway franchises in Des Moines Street R. R. Co. *vs.* Des Moines Broad Gauge R. R. Co., 73 Iowa, 513; 33 N. W., 610 (a case reviewed and quoted from in Mr. Trippet's brief, pp. 31, 32, and in Mr. Gregory's brief, p. 42). It is there said that—

> "the public rights are secured by an implied obligation on the part of the company, acting under an ordinance to hold itself in readiness at all times to construct and operate so much track, and upon such streets, as the public convenience may require, to be determined by the City Council in the exercise of a reasonable and proper discretion,—the company to have a reasonable time to complete after the requisition shall be made."

And indeed this rule would apply in new territory added to the municipality.

Illinois Central Railroad Co. *vs.* City of Chicago, 176 U. S., 646, 665 to 667.

People *vs.* Deehan, 153 N. Y., 528.

People *vs.* Detroit United Railway Co., 162 Mich., 460; 125 N. W., 700.

Indiana Railway Co. *vs.* Hoffman, 161 N. E., 399.

Truesdale *vs.* City of Newport, — Ky. —, 90 S. W., 589.

St. Louis Gas Light Company *vs.* City of St. Louis, 46 Mo., 121.

Carroll *vs.* Silver Creek Gas Company, 139 N. Y. Supl., 161; 153 App. Div., 630.

Tulsa Ry. Co. *vs.* Okla. Co., 27 Okla., 313; 113 Pac., 180.

The underlying idea in all of the cases cited may be summed up in the statement found in Indiana Railway Co. *vs.* Hoffman, *supra*, that "in a legal sense the city is a unit," and in St. Louis Gas Light Company *vs.* City of St. Louis, *supra*, that "the city is a unit."

One more case may be cited and although it does not deal with the subject here in hand, nevertheless the analogy is complete.

In the City of Los Angeles *vs.* Pomeroy, 124 Cal., 597, 649, 650, the Mexican pueblo of Los Angeles had a right to the waters of the Los Angeles river in priority to the rights of riparian owners, and it was held that this priority grew in extent and volume with the growth of the city, whether due to increase in population, diversity of use, or extension of territory, or all of them.

VI.

In construing section 19 of article XI of the constitution of California as it existed from 1879 to 1911, the surrounding circumstances should receive consideration and are entitled to great weight.

It is a well-established rule that constitutions, statutes and contracts are to be read in the light of the circumstances existing at their respective dates. With that in view we think the following considerations will naturally affect a conclusion respecting what was meant by section 19 of article XI of the constitution when it was enacted in 1879.

1. The framers of the constitution of California intended that there should be full and free competition in the matter of furnishing water and artificial light to the municipalities of the State and "that there should be no restriction upon competition in supplying these prime necessities" (129 Cal., 397).

2. To this end the framers of the constitution intended to

encourage and not discourage investments in these enterprises.

3. The framers of the constitution intended that these enterprises should be free from all local regulation except in the limited instances enumerated in the section itself, and this with a view to giving these enterprises as much freedom as possible, always with an eye solely to the public welfare.

4. The grant of franchises was intended to be, and was in fact, self-executing.

5. It was intended that the franchises secured under this section should be equal in value and importance to those which had been obtained in times past by legislative grant or by municipal grant under delegated power.

6. It was intended, of course, and the section clearly provides, a general rule covering all municipalities existing in 1879, some large and most of them small, and all municipalities of the State which should afterwards come into existence, whether they were large and important cities or small and unimportant.

7. The section was not intended to serve private interests, but it was intended to achieve an important public purpose which the framers of the constitution were of the opinion could only be achieved if the investments to be made under the invitation of the section were on as advantageous terms as those which had been given in similar grants under the system of granting franchises which the constitution was designed to supersede.

8. The provision was intended to do for each of the municipalities of the State what that municipality might have done for itself had it been so authorized, namely, to grant a franchise for supplying the municipality and its inhabitants with water and to grant a franchise to supply the municipality and its inhabitants with artificial light.

VII.

Section 19 of article XI of the constitution of California, adopted in 1879, was intended to grant, and in fact did grant, when accepted, franchises to supply water and artificial gas to the entire municipality and to all of its inhabitants, and the acceptance of the offer created corelative duties of an equal extent.

The provision was as follows:

> "In any city where there are no public works owned and controlled by the municipality, for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this State, shall, under the direction of the Superintendent of Streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas light or other illuminating light or with fresh water for domestic and all other purposes, under the condition that the Government shall have the right to regulate the charges thereof."

Under the second point made in this brief we quoted the grant of the gas-light franchise involved in People *vs.* Deehan, 153 N. Y., 528, quoted with approval in 176 U. S., 646, 666, and also the water franchise involved in Boise Water Company *vs.* Boise City, 230 U. S., 84, and an examination of these three franchises will show that the one conferred by the constitution of California is at least as comprehensive as either of the other two; and, as it was expressly held in People *vs.* Deehan, that the right of the company to extend its plant could not be cut off (upon which point the case was

approved in 176 U. S., 646, 666), and as it is held either in terms or by inevitable implication in the Boise City case that the right of continued development existed under the Boise City franchise, we submit that it ought to be held in this case that the franchise granted by the constitution of California and accepted by the Economy Gas Company entitles that company (and binds it) to extend its system and mains as and when required by the circumstances of the case and the growth of business in and the needs of Los Angeles.

We furthermore submit that our franchise is as comprehensive as those involved in Louisville *vs.* Cumberland Telephone Company, 224 U. S., 649, and Owensboro *vs.* Cumberland Telephone Company, 230 U. S., 58, which also either in terms or by inevitable implication secured to the telephone company the right to continue to extend its plants to meet the occasions of business, and imposed upon the company a corelative duty of equal extent so to do as and when required.

VIII.

The very nature of the subject-matter of franchises for supplying water and artificial light to municipalities presupposes that the grantee will at the beginning occupy but a small portion of the area in which the franchise is to operate, and later, with growth and expansion, will occupy the whole area.

This is clearly recognized in the cases from which we make the quotations below:

> "The construction of municipal waterworks is a matter of growth. It is necessary in common prudence, on the one hand, to construct works of such capacity as to satisfy the needs of the growing city, not only at the moment, but within the near future. * * * As such works are a necessity to the city, they must keep pace with, and to some extent anticipate, its growth."
>
> San Diego Water Company *vs.* San Diego, 118 Cal., 556, 568.

"The grant was made in contemplation of the investment of large capital in the construction of a system of waterworks for the permanent supply of the city with water. The presumption is that no such enterprises would have been entered upon if the street easement was subject to immediate revocation."

Boise Water Company *vs.* Boise City, 230 U. S., 84, 91.

"It is well known that business enterprises such as the relator [Woodhaven Gas Light Company] is engaged in are based upon calculations of future growth and expansion."

People *vs.* Deehan, 153 New York, 528; 47 N. E., 787.

"It was not to be supposed that the enormous plant of the corporation or of its constituent parts, embracing as it now does the entire present street area of these two boroughs of Manhattan and the Bronx, would at the time of granting the consent be immediately laid, not only in the then existing part of the city, but also in that subsequently developed (then in prospective only), for such grants are comprehensive enough to embrace both (People *ex Rel.* Woodhaven Co. *vs.* Deehan, 153 N. Y., 528; 47 N. E., 787), but rather that its development would be slow, meeting the present needs, growing contemporaneously with the city's development, and as new streets, avenues, etc., were opened and houses built thereon and occupied, and demands for service made, the company would respond to meet the obligations its franchise from the State imposed."

In re Consolidated Gas Co., 106 N. Y. S., 407; 56 Misc., 49.

And in a case involving a street railway franchise, liberally quoted from in Mr. Trippet's brief, pp. 45 to 48, it was said:

"The company appears to have planned, almost in the inception of its efforts, a system radiating from a central point in the business section of the city from which its cars start, extending in different direc-

tions and to which they return. From its main lines in the central part branches have been, and from time to time as public demand requires, necessarily will be taken off, and lines have been, and will be, as it was intended, extended to meet the city's growth."

Mercantile Trust Company *vs.* Denver, 161 Federal, 769; affirmed in 201 Federal, 790, 808.

IX.

It is settled by authority that franchises of the type here involved are coextensive with the limits of the municipality.

In People *vs.* Deehan, 153 N. Y., 528; 47 N. E., 787, a gas franchise was voted by a resolution of the local authorities of the town of Jamaica, whereby they consented—

> "that the Woodhaven Gas Light Company may have the power, and the same is hereby conferred upon and granted to them, of laying conductors for conducting gas in and through the public streets and highways of this town of Jamaica."

Speaking of this franchise, the Court of Appeals of New York said:

> "This grant, by its terms, is plainly coextensive with the limits of the town, and was not confined to any particular street, highway or other local division."

In Boise Water Company *vs.* Boise City, 230 U. S., 84, the water franchise was given by a resolution which authorized the grantees—

> "to lay and repair their water pipes in, through and along and across the streets and alleys of Boise City, under the surface thereof."

In its decision in the case this court takes for granted that such a franchise is coextensive with the municipality.

In Commonwealth *ex rel.* Bell Telephone Company *vs.* Warwick, Mayor (1898), 185 Pennsylvania State, 623; 40 Atlantic, 93, an ordinance of Philadelphia authorized the telephone company to run its wires "over and through the streets of the city." In reliance upon this ordinance the telephone company established its business in Philadelphia. Later there was an attempt made to prevent the extension of the telephone system. The court said:

> "The original grant of consent extended to all the streets of the city. There was no limitation then and there could be none imposed thereafter."

See also

City of Quincy *vs.* Bull (1883), 106 Ill., 337.

Williamsport Co. *vs.* Williamsport (1888), 120 Pa. St., 1; 13 Atlantic, 496.

Inhabitants of West Springfield *vs.* West Springfield Aqueduct Co. (1896), 167 Mass., 128; 42 N. E., 1063.

In its decision here under review (Matter of Russell, 163 Cal., 668) the Supreme Court of California draws a distinction between grants to specified corporations and grants by general law to become available upon acceptance, a distinction to which we shall hereafter refer and which we believe is not sustained in reason nor supported by authority.

Inasmuch, however, as the Supreme Court of California has drawn this distinction, we desire briefly to call attention to decisions, not noted by that court, where the grants were made by general law and in complete analogy to the constitutional amendment involved in this case.

In Northwestern Telephone Company *vs.* Minneapolis (1900), 81 Minn., 140; 83 N. W., 527; 86 N. W., 69, the telephone company, acting upon a grant contained in a general law, entered the city of Minneapolis and began to construct a telephone exchange. The court held that this was an acceptance of a grant which entitled the telephone com-

pany to occupy in time all of the streets of the city, a contract right of which it could not be deprived.

In City of Duluth *vs.* Duluth Telephone Company (1901), 84 Minn., 486; 87 N. W., 1127, a similar conclusion was reached upon a precisely similar state of facts.

In Michigan Telephone Company *vs.* City of St. Joseph (1899), 121 Mich., 502; 80 N. W., 383, the telephone company seems to have obtained its right to enter the municipality under a general law and also under a municipal permit not referable to the grant of a franchise, but one required in the exercise of police power. (The case therefore is one where a franchise was obtained by a company to which the franchise was not specifically granted.) After the company had installed its plant the municipality attempted to prevent it from occupying new streets except upon permission (in the nature of a franchise), but it was held that this would violate the contract rights of the company, and necessarily that its acceptance of the grant under the general law gave it a right coextensive with the municipality and exercisable in time throughout the municipality, according to the exigencies and necessities of its business.

In State *vs.* Nebraska Telephone Company (1905), 127 Iowa, 194; 103 N. W., 120, a telephone company entered the city of Council Bluffs and installed a telephone plant under the general law. It was held that it could not be prevented from extending its plant through new streets in the city, because by the acceptance of the general law, manifested by entering the city, it obtained a right coextensive with the municipality.

In our opening briefs we cite a number of additional cases to the point here under consideration, and it is submitted that an examination of all of the cases will show that it is well settled by authority that franchises of the type here involved are coextensive with the limits of the municipality, and in that respect that there is no distinction between franchises granted to specified individuals or corporations and franchises granted by general statute to become available upon acceptance manifested.

X.

The conclusion reached by the Supreme Court of California in its decision here under review, Matter of Russell, 163 Cal., 668, is based on manifest errors appearing on the face of the opinion.

1. The court erred in assuming that a proper disposition of the matter in hand should be affected by the circumstance that the constitutional provision was not specific with respect "to either places or persons," because (*a*) the provision is to be read distributively, so far as it relates to the municipalities, each municipality being a case apart; and (*b*), because Stanislaus County *vs.* San Joaquin Canal Co., 192 U. S., 201, is full authority for the proposition that, although the grant contained in the California constitution was general in character and named no specific grantee or municipality, nevertheless when accepted by any person or corporation it became as to that person or corporation a special franchise or charter of equal effect as if the people of the State, through authorized authorities, had issued to that person or corporation a distinct franchise or charter.

2. The court erred in assuming that a proper disposition of the matter in hand should be affected by the circumstance that the acceptance of a franchise by acts and conduct would not have the full force and effect of "a formal or written acceptance" had one been required. The court in effect says that a formal or written acceptance "would be in the nature of a conveyance vesting the right in advance of, and regardless of, its use."

If we are correct in the position which we take elsewhere, that there was but one offer which we could accept, and that was to serve the entire municipality, then any act which we took referable to the offer must be conclusively presumed to have been intended as our manifestation of acceptance of the offer as tendered.

3. The court erred in assuming that there was nothing "to express the intention that the right offered should take

effect in any street before it was actually used, or should vest as to all of them the moment that the use is begun in good faith in one."

At the adoption of the constitution of California in 1879 there were countless outstanding franchises for gas and water in the country, and these gas and water franchises were granted in general terms and their scope and effect was well known, and there was no disagreement with respect to their effect. The constitutional provision is to be read in the light of public knowledge and the state of the law respecting such franchises.

4. The court erred in assuming that there was any ambiguity in the subject-matter which justified the invocation of the rule that public grants "are to be construed most strongly in favor of the public," and erred in assuming that that rule meant any more than it was declared to mean in People *vs.* Deehan, 153 N. Y., 528, where it was said that "the rule that public grants are to be construed strictly against the grantee means simply that nothing shall pass by implication except it be necessary to carry into effect the obvious intent of the grant."

In this connection see Mr. Wheeler's brief upon the construction to which the grant is entitled, and Mr. Trippet's brief, page 25, showing that the Supreme Court of California has given the grant a liberal construction.

5. The court erred in failing to note the manifest distinction between a State law authorizing a telegraph company to set up poles in the public roads, which does not involve a correlative duty on the part of the telegraph company to traverse the entire State with its lines, and the grant of a municipal franchise carrying with it the duty upon the part of the grantee of the franchise to serve the entire community and all of its inhabitants as and when required, having regard to the circumstances of each case.

6. The court erred in putting reliance upon the cases cited by it, because they are of the type just mentioned, having to do with a statutory grant of privilege to establish poles in the highways of a State and to string wires thereon, without

the correlative duty to occupy all the highways of the State as a part of a contract engagement of the telegraph company so to do.

7. The court erred in specifically denying consideration to cases which involved grants of franchises in streets of a particular city to a particular person or corporation, because (as we insist) such grants afford perfect analogy to the constitutional grant here involved, and for the additional reason that it was the very purpose of the constitutional grant to offer franchises of this type in all of the municipalities of the State to whomsoever would accept the same and fulfill the requirements thereof.

8. The court erred in failing to give effect to the decisions dealing with franchises granted by general law in the municipalities of the States by which general laws the franchises became effective by acceptance thereof (manifested by acts and conduct) for the reason that these cases afford complete analogy to the case here under consideration.

XI.

The franchises granted by section 19 of article XI of the constitution of California as it existed between 1879 and 1911 are in perpetuity.

In the brief for defendant in error, pages 54 to 62, it is argued that "no perpetual rights vested in the Economic Gas Company."

At the beginning of this brief we pointed out that there is no provision of the constitution of California, and if it were of any importance, no law of California, general or local, State or municipal, limiting the duration of franchises acquired under and in pursuance of section 19 of article XI of the constitution as it existed from 1879 to 1911.

In view of this fact it is established law in this court (*a*)

that these franchises are not revocable at pleasure, but (*b*) on the contrary that they are perpetual.

Boise Water Company *vs.* Boise City, 230 U. S., 84.

Owensboro *vs.* Cumberland Telephone Co., 230 U. S., 58.

To the same effect is Louisville *vs.* Cumberland Telephone Co., 224 U. S., 663, for quotation from which see Mr. Wheeler's brief, pages 17, 18.

In connection with the present point it is to be kept in mind that the franchise here claimed *is not exclusive.*

Again, there is nothing unreasonable in the idea of a perpetual franchise, when as here, there is a permanent and irrevocable dedication of the capital invested in the undertaking.

See—

San Diego Water Co. *vs.* San Diego, 118 Cal., 556, 568-9, quoted in Mr. Trippet's brief, page 53.

City of South Pasadena *vs.* Pasadena Land & Water Co., 152 Cal., 579; 93 Pac., 490.

Attorney General *vs.* Haverhill Gaslight Co., — Mass., —; 101 N. E., 1061.

XII.

It is submitted that the disposition of this case should be controlled by four recent decisions of this court.

The cases to which we thus refer are:

Louisville *vs.* Cumberland Telephone Company, 224 U. S., 649.

Grand Trunk Company *vs.* City of South Bend, 227 U. S., 544.

Owensboro *vs.* Cumberland Telephone Company, 230 U. S., 58.

Boise Water Company *vs.* Boise City, 230 U. S., 84.

If we were to add another to these cases it would be Illinois Central Railroad *vs.* Chicago, 176 U. S., 646, 666, approving and following People *vs.* Deehan, 153 N. Y., 528.

We submit that these five cases deal with all of the questions involved in this case and that the rules therein laid down are in accordance with the contentions advanced in this case by the plaintiff in error.

XIII.

Conclusion.

It is respectfully submitted that the franchise of the Economic Gas Company is coextensive with the limits of the municipality which it agreed to serve; that the effect of the amendment of 1911, as interpreted by the Supreme Court of California, is to impair the contract rights of the Economic Gas Company acquired by its franchise just mentioned, and that therefore the judgment of the Supreme Court of California in the case here under review should be reversed, with directions to discharge the plaintiff in error from custody.

Respectfully submitted,

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WARREN GREGORY,
GARRET W. McENERNEY,
Of Counsel for Plaintiff in Error.

WASHINGTON, D. C.,
January 5, 1914.

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SYLLABUS.

The decision in the case at bar, which rests on the theory that the rule of strict construction is the true measure of the grant tendered by Section 19 of Article XI of the Constitution of California, is erroneous.

1. The rule that public grants are to be strictly construed is not applicable to that section, for the following reasons:

(a) The rule of strict construction must always be applied in subordination to the rule that a general law enacted to induce public service, and offering a franchise as an inducement, must be construed liberally in order to lead persons to undertake the enterprise.

Section 19 of Article XI was enacted to bring about competition in the public service of supplying light and water to the inhabitants of municipalities. As an inducement, it offered to all persons the franchise to use the streets of cities for that purpose, but the time for which the franchise was to endure was not specified. If, under these conditions, the rule of strict construction were applicable, the franchise would be revocable at will, and no sane person would have embarked on such an enterprise on these terms.

(b) The decisions of the Supreme Court of California, for over thirty years, rejected the rule of strict construction, and declared that this constitutional provision should receive a "practical, common-sense construction." Relying thereon, vast sums have been expended, and no change in the rule of interpretation can now be sanctioned.

(c) The grant was not made by a "public officer or body," and the rule of strict construction, as declared by the statutes of California, is limited to cases in which the grant is made by a public officer or body.

(d) The common law rule of strict construction is not applicable, because the grant was made without solicitation by the grantee.

2. Even if the rule of strict construction were ap-

plicable in general, the decision in the case under review is erroneous. Sec. 19 of Art. XI offered the use of the streets to those undertaking to supply light or water to the city and its inhabitants. A person exercising the franchise was subject to the obligation of extending the service as directed by the authorities. The territorial extent of the franchise is measured by the obligation of the person accepting the grant, not by the extent to which that person had actually availed himself of it. The extent of the grant is not to be measured by the evidence of acceptance.

In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, 1912.

ROBERT RUSSELL,
Plaintiff in Error,

vs.

CHARLES E. SEBASTIAN,
Defendant in Error.

PRELIMINARY STATEMENT.

The argument presented in this Brief differs from that advanced by counsel for the Economic Gas Company. To those on behalf of whom this Brief is presented, the importance of the case rests upon the general effect of the decision of the Supreme Court of California here under review,[1] which explicitly sanctions the gradual extinction of all light and water companies now operating within the municipalities of that State. The right of these to grow and extend—a right practically essential to life—is directly denied; but this is not all,

Importance of question.

[1] Matter of Russell, 163 Cal., 668.

for the decision rests on a rule of law which, if applicable, authorizes the immediate destruction of these companies by the municipal authorities.

The franchises of all these companies depend upon Section 19 of Article XI of the Constitution of California as it existed prior to 1911. By repeated decisions, the State Court had held that persons accepting the offer tendered by this section acquired franchises.

Rule of liberal construction declared in early decisions and applied until 1911.

The language of this constitutional provision was broad and general. The Supreme Court of California, for over thirty years consistently declared that "it must receive a practical, common-sense construction,"[1] and should be liberally construed to effect its purpose.[2]

Several hundred million dollars have been invested on the faith of the constitutional provision construed in the light of the rules previously declared. Since the constitutional amendment of 1911, further investment was not invited, and by the decision under review the old rules of construction are repudiated. The "practical, common-sense construction" necessary to induce any sane person to accept the offer tendered is now rejected, and the rule

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[1] People v. Stephens (1882), 62 Cal., 233.

[2] South Pasadena v. Pasadena Land Co. (1909), 152 Cal., 580.

of strict construction declared to be the true measure.

Positions assumed by Respondent rest on rule of strict construction.

In the matter here under review, counsel for the City of Los Angeles contended:

1. That the rights acquired by persons accepting the offer contained in Section 19 of Article XI should be ascertained under the measure of strict construction;

2. That, measured by this rule, the franchises of the companies amounted to no more than licenses revocable at will; and

3. That, similarly measured, the franchises gave no right to make extensions.

Decision of Court based on rule of strict construction.

The decision here under review asserts that the rule of strict construction is the measure, and that therefore the City can, by ordinance, deny the right of extension. The opinion does not pass on the question of the life of the franchise, as the City of Los Angeles has not attempted to declare it terminated. However, the right of the City to terminate the franchise at will is amply sustained by principle and authority, if the rule of strict construction be the true measure. If the application of this measure be sanctioned by this tribunal, it is but reasonable to assume that the right to terminate, asserted on behalf of the municipality, will be exercised.

Result of affirmance of this decision.

The importance of the case is, therefore, apparent, not only because of the direct effect of the decision under review, but also because of the result flowing from the application of the rule of construction adopted.

Federal question presented.

But the Supreme Court of California is not at liberty to set aside a rule of construction, on the faith of which contracts have been made and fortunes expended, without the sanction of this Court.

As said by this Court in the case of *Grand Trunk R. R.* v. *South Bend*, 227 U. S., 544:

> "What the contract alleged to be impaired by subsequent legislation is, is a question which this Court is bound to determine for itself independent of decisions of the State Court. *Northern Pacific Ry.* v. *Duluth*, 208 U. S., 590."

The construction now adopted is that which is believed to be in furtherance of the object of the amendment of 1911.

The fact of the matter is, that from 1879 until recent time the people of the State of California desired to destroy monopoly, and encourage competition in supplying light and water to the inhabitants of municipalities. In furtherance of this object, Section 19 of Article XI of the Constitution was adopted, and this provision at once received a construction at the hands of the judiciary calculated to bring about the then desired results. At the present time, a portion of the people desire to have this service performed by the municipality itself, free from

competition, and the Constitution has received a construction well calculated to destroy those persons who had theretofore been encouraged to embark upon the venture.

STATEMENT OF LEGISLATION AND JUDICIAL DECISIONS RELATING TO SECTION 19 OF ARTICLE XI.

Franchises prior to 1879.

Under the Constitution of 1850, and supplementary legislation, franchises to supply the inhabitants of cities with light and water came from the governing body of the municipality, and though these were not necessarily monopolistic, as a matter of law, they resulted in the practical creation of a monopoly through the political control exercised by the owners over the municipal authorities. The framers of the Constitution of 1879 determined to destroy this condition, by inserting therein the following provision:

Section 19 of Article XI, of the Constitution of 1879.

> "In any City where there are no public works owned and controlled by the municipality, for supplying the same with water or artificial light, any individual, or any Company duly incorporated for such purpose under and by authority of the laws of this State, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares, or of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such City and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."
>
> Constitution of California, Section 19, Article XI.

As early as 1882, the Supreme Court said:

Liberal rule of construction adopted. People vs. Stephens, 1882.

> "Now these provisions, as well as all other provisions of the Constitution, must receive a practical, common-sense construction. They must be considered with reference to the prior state of the law, and with reference to the mischief intended to be remedied by the change."

People v. *Stephens,* 62 Cal., 233.

Amendment of 1885 re-enacting provision without change after rule of liberal construction had been applied.

This section, as originally adopted, embraced other provisions which were not germane to this subject, and were omitted in the amendment of 1885, by which the language above quoted from the Constitution was adopted and re-enacted as part of the Constitution of the State. In this manner the rule of interpretation laid down in *People* v. *Stephens* became incorporated in the law.

This provision of the Constitution came before the Courts on various occasions, and it was repeatedly decided that it operated to vest a franchise in those accepting the offer therein contained.

In *Stockton Gas Company* v. *San Joaquin County,* 148 Cal., 313, it was said:

Section 19 of Article XI repeatedly construed as granting a franchise.

> "The Constitution extends a potential right to those enumerated in its provisions to avail themselves of the benefit of the franchise. But this general extension of the privilege does not invest individuals or corporations with the franchise in the streets of any particular City. It is only acquired

when the constitutional grant is actually accepted. . . . By the provisions of the Constitution, all persons and all corporations organized for the purpose of supplying these necessities are given the capacity to take the franchise extended thereunder, but they do not acquire it until they have accepted it by proceeding to its actual exercise."

In the case of *Clark* v. *Los Angeles,* 160 Cal., 30, decided in May, 1911, some few months before the section was repealed, the Court said:

Franchise granted defined as including right to make extensions.

"The express grant made by Section 19 is of the privilege, franchise, or easement to place in the public streets of a City the conduits *necessary or convenient for the business of supplying light or power to the City and its inhabitants.* It may be accepted by any person, or by any Company duly incorporated to engage in that business. The section does not declare that such franchise or easement, when accepted, shall be exclusive. It implies the contrary, for it does not confine the grant to the first person or corporation to accept it and use the streets, but extends it to 'any individual or any Company' (See *Stockton, etc. Co.* v. *San Joaquin Co.,* 148 Cal., 318; 5 L. R. A. [N. S.], 174; 83 Pac., 54). The debates over its passage in the constitutional convention show that it was not intended to give a monopoly to the first company, or to encourage monopolies at all, but to prevent them so far as the right to use the streets was concerned, by conferring the right upon any competitor against an established company (*People* v. *Stephens,* 62 Cal., 235). It is true the right is not given in cities which are operating municipal works for the same purpose."

Obligation to extend service arising from acceptance of franchise.

A person accepting the franchise was obligated to supply the service and extend the distributing system, as the exigencies of the City

or its inhabitants required, and the statutes in force imposed this obligation.

Water Companies.

"All corporations formed to supply water to cities or towns must furnish pure, fresh water to the inhabitants thereof, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor; and must furnish water to the extent of their means, in case of fire or other great necessity, free of charge. The board of supervisors, or the proper City or town authorities, may prescribe proper rules relating to the delivery of water, not inconsistent with the laws of the State."

Civil Code of California, Section 549.

Lighting Companies.

"Upon the application in writing of the owner or occupant of any building or premises distant not more than one hundred feet from any main, or direct or primary wire, of the corporation, and payment by the applicant of all money due from him, the corporation must supply gas or electricity as required for such building or premises, and cannot refuse on the ground of any indebtedness of any former owner or occupant thereof, unless the applicant has undertaken to pay the same. If, for the space of ten days after such application, the corporation refuses or neglects to supply the gas or electricity required, it must pay to the applicant the sum of fifty dollars as liquidated damages for every day such refusal or neglect continues thereafter."

Civil Code of California, Section 629.

In *Lukrawa* v. *Spring Valley Water Co.*, 15 Cal. App. Dec., 796, 798, the Court said:

"Upon a review and a careful consideration of all of the authorities bearing directly and indirectly upon the subject under discussion, we are strongly

> of the opinion that a water company, committed by its charter to the public service, is in duty bound to serve the whole public; and that when necessary to such service the Company's existing mains must be gradually extended so as to keep pace with the growth of the community which the Company has undertaken to serve."

Property devoted to public use on exercise of franchise is dedicated in perpetuity.

It was also well settled that once property was devoted to public service, and the franchise offered by the Constitution accepted, the property could not be withdrawn from the use to which it had been applied, and the obligation to render such service and utilize the property for that purpose is a perpetual burden upon the property, and will be enforced against any person into whose hands the property passes.

As stated in *South Pasadena* v. *Pasadena Land Co.*, 152 Cal., 580:

> "In the case of the establishment of a water system to supply water for public use, all the persons to whose use the water is appropriated *or dedicated* are vested with a right to have the supply continued by whomsoever may be in control thereof, and may enforce such right by a proceeding in *mandamus* against the person in control of the supply and the works by which it is distributed, regardless of the title, to compel the continuance of the distribution, in the usual and proper manner, to those entitled. This rule is applicable, and the remedy by *mandamus* available, whether the person in control of the supply is a municipal or a private corporation, or an individual."

From 1879 to 1911 the Constitution, laws and decisions of the Courts of California were di-

rected to carrying out the policy of the framers of the Constitution of 1879,—the encouragement of competition in public service and the destruction of monopoly.

In 1911 the Constitution was amended. Section 19 of Article XI was changed, and the entire matter placed within the control of local authorities so far as this might be done consistently with prior vested rights and contractual relations. The reason for the change was the desire to give the municipalities a free hand and thus advance the cause of public ownership.

ARGUMENT.

If the rule of strict construction were applicable to Sec. 19 of Article XI, no sane person would have accepted the offer.

Neither municipalities, nor other corporations engaged in public service, suffer competition gladly, so it is but reasonable to assume that if the power to terminate at will the franchises of corporations engaged in public service in California has been given to municipal corporations, and can be exercised by them, it will be used. Indeed, in the case at bar this very power was asserted in the State Court by the counsel representing the City of Los Angeles. If this power exists, and is not exercised to its full extent at once, on account of public inconvenience, it is but reasonable to suppose that it will be availed of to prevent the contest of such rates as may be fixed by the governing bodies of the municipalities. Compliance with a rate prescribed may readily be made a condition of the right to continue operation if the companies hold no more than a revocable license. The decision of the Supreme Court of California is a virtual recognition of the claims advanced by counsel for the City, as it is based upon the theory that the rule of strict construction may be properly applied to the provisions of *Section 19 of Article XI of the Constitution,* which declares:

> "In any City where there are no public works owned and controlled by the municipality, for supplying the same with water or artificial light, any

individual or any Company duly incorporated for such purpose under and by authority of the laws of this State, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, or of laying down pipes and conduits therein and connections therewith, so far as may be necessary for introducing into and supplying such City and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

As this constitutional provision does not specify the time for which the franchise offered shall endure, it is obvious that if the rule of strict construction be the true measure, a license revocable at will and nothing more has been given.

Boise City v. *Boise Water Co.*, 186 Fed., 705.

The grant contains no habendum, and no words of limitation operating to define the interest of the grantee are used. The duration of the interest is entirely dependent on the rule of construction adopted. If the rule of strict construction is the true measure, the interest passing is the very least which will conform to the words employed,—in this case an estate at will or a revocable license.

Boise Water Co. v. *Boise City*, 123 Fed., 232.

THE RULE OF STRICT CONSTRUCTION IS NOT APPLICABLE TO SECTION 19 OF ARTICLE XI.

Ordinarily a constitutional provision is to be liberally construed for the purpose of carrying into effect the object for which it was enacted.

If the provision contains a grant or an offer of a grant for the purpose of inducing public service, the offer should be construed in case of doubt as sufficiently extensive to induce people to undertake the performance of the service.

> *Winona R. R.* v. *Barney*, 113 U. S., 625; *United States* v. *D. & R. G. R. R.*, 150 U. S., 1, 14.

Object for which Section 19 of Article XI was enacted.

The object sought to be attained by the enactment of this provision has been repeatedly declared in the decisions. In *Stockton Gas Co.* v. *San Joaquin County*, 148 Cal., 313, it was stated as follows:

> "While considering this constitutional grant of the right to use the streets of cities throughout the State by individuals or corporations for supplying either water or artificial light (when the City owns no public works for such purpose), it is well to remember the purpose which was sought to be attained under the provision. It was to prevent the abuses which the framers of the Constitution believed were theretofore indulged in by municipal officers, who, by imposing onerous burdens and conditions upon persons desiring to compete with existing companies in such municipalities in supplying such necessities, precluded them from doing so, and hence created a monopoly in favor of existing corporations. By providing for unrestricted competition in the supplying of these necessities, it prevented such abuses."

and, as said in *South Pasadena* v. *Pasadena Land Co.*, 152 Cal., 594:

> "The provision is intended to further the interest of the public and facilitate the supply of water to the inhabitants of the City, and it should be liberally construed to effect that purpose."

The true construction is that which will effectuate this object.

so, as said in *People* v. *Stephens*, 62 Cal., 233:

> "Now, these provisions, as well as all other provisions of the Constitution, must receive a practical, common-sense construction. They must be considered with reference to the prior state of the law, and with reference to the mischief intended to be remedied by the change."

It is, however, apparent that if the rule of strict construction be adopted as the measure of the offer embraced in this section, the object of destroying monopoly and decreasing the cost of public service by competition, would never have been accomplished.

Object of enactment would not have been effectuated if rule of strict construction were applicable.

No sane person will invest millions of dollars on the strength of a revocable license. Yet this provision of the Constitution was designed to invite the investment of hundreds of millions of dollars, and such sums have been invested in reliance thereon. The investment invited was not monopolistic in character,—indeed the purpose of this provision was to induce investment in competition with established concerns having definite franchises, as well as those given by this provision of the Constitution. The

framers of the Constitution could not have imagined that competition could have been obtained on such unfavorable terms. It may be urged that the fact that this license was contained in the Constitution itself gave to it permanency of character which would obviate this suggestion. This argument would not be entitled to much weight as the Constitution of 1879 was never regarded as permanent, and the fact that it would be repeatedly amended was at all times recognized. But apart from this, such an argument ignores the very provision of the section under consideration, for by its own terms this provision ceased to have prospective operation the very moment the municipality constructed its own plant.

If the continued existence and operation of this constitutional provision is essential to the right of the grantee to make extensions, it is equally essential to the right of the grantee to use existing pipes, for the right to use the highways, as well as the right to lay pipes, both flow from this provision, and the one is no more permanent than the other.

But by its own terms, the provision ceases to operate in any municipality which owns its own works. Accordingly, if the rule of strict construction be adopted, the Court must declare

that people were expected to understand by this provision that:

(1) An invitation was extended to enter into the field of public service, and assume the obligations to serve the City and its existing and future inhabitants;

(2) No monopoly was given, but competition with existing public service, protected by definite franchises, was desired;

(3) A person devoting property to this public service could never free it from the use to which it had been put;

(4) Though service of this class involved the investment of vast sums in inconvertible capital, yet the investment was invited upon a license revocable at will by the people of the State, and revocable by the construction of similar works by the municipality served.

It is obvious that such an interpretation would defeat the object for which this provision was adopted, and should therefore be rejected. As said by this Court in *Louisville* v. *Cumberland Telephone Co.*, 224 U. S., 663:

> "In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures. These structures are permanent in their nature and require a large investment for

> their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the State's purpose to secure a telephone system for public use. For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at will of the city, and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter cannot be supported, either from a practical or technical standpoint."

The desire of the people was to destroy monopoly, and in furtherance of this desire they offered permanent franchises to those willing to embark in this service in open competition. If the State desires, it may change this policy as to the future, and restrict further competition as it sees fit, but it cannot expropriate the property of those who accepted the offer which it extended.

NEITHER THE COMMON LAW RULES NOR THE STATUTES IN FORCE AUTHORIZE RESORT TO THE RULE OF STRICT CONSTRUCTION.

If the provisions of Section 19 of Article XI were embraced in a general law passed under the initiative, the rule of strict construction would not apply.

It will probably be claimed that the mere fact that the provisions of law under consideration are embraced in the Constitution, does not call for an interpretation differing from that which would be accorded to an ordinary grant; that the rule of strict construction of public grants and contracts applies, and is applicable to such grants on account of the subject matter, irrespective of the form in which the grant is made.[1]

If this grant is to be interpreted in accordance either with the common law, or the statutes in force in California at the time the Constitution was adopted, which were a codification of the common law, still the rule of strict construction is not applicable.

Statutory provisions regarding interpretation.

> "All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this Code."
>
> Civil Code of California, Section 1635.

> "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."
>
> Civil Code of California, Section 1636.

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[1] The decisions of this court declare that where an offer of a grant is extended by a law which becomes operative on acceptance, then the rule of strict construction is not the proper measure. Missouri, Kan. etc. R. R. Co. v. Kan. Pac. R. R., 97 U. S., 497.

Expressly subordinate to these provisions are the following sections of the code:

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect. If it can be done without violating the intention of the parties."

Civil Code of California, Section 1643.

"If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."

Civil Code of California, Section ~~649~~ 1649.

"In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party, except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

Civil Code of California, Section 1654.

"Words of inheritance or succession are not requisite to transfer a fee in real property."

Civil Code of California, Section 1072.

"A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, to a private party, is to be interpreted in favor of the grantor."

Civil Code of California, Section 1069.

The provisions of this last section are not su-

perior to, but are to be applied in subordination to, the rules above set forth. *King* v. *Samuels,* 7 Cal. App., 69.

The rule of strict compliance is applicable only to grants of public property when made by agencies.

These statutory provisions apply expressly to public grants (Civil Code of California, Section 1635), and are in the main declaratory of the common law. The exception embraced in Section 1069, Civil Code of California, is confined to grants made by "a public officer or body." Thus the exception is based not on the fact that a grant is made by the public, but on the fact that the grant is made through certain specified agencies. The rule of construction in favor of the public does not apply if the grant be not made through "a public officer or body" but directly by the people. So the fact that the grant has been made by the people directly, in the very Constitution itself, does exclude the application of the rule of strict construction as that rule is declared in the statutes of the State.

But these statutes are a mere codification of the common law, and under that system the rule of strict construction would not apply to the grant under consideration. In *Chitty on Prerogatives,* pages 393 and 394, the rules on this subject are stated as follows:

At common law this grant was not subject to the rule of strict construction.

"But the rule that grants shall be construed most favorably for the King, is subject to many limitations and exceptions.

"In the first place, no strained or extravagant construction is to be made in favor of the King. If the intention be obvious, royal grants are to receive a fair and liberal interpretation accordingly.

"In the second place, the construction and leaning shall be in favor of the subject, if the grant show that it was not made at the solicitation of the grantee.

"In the third place, if the King's grants are upon a valuable consideration, they shall be construed strictly for the patentee for the honor of the King.

"So where the King's grant is capable of two constructions, by the one of which it will be valid, and by the other void, it shall receive that interpretation which will give it effect; 'for that will be more for the benefit of the subject and the Honor of the King, which ought to be more regarded than his profit.'"

We respectfully submit that the rule of strict construction as it existed at common law, and as it is declared by the statutes of California, can not be resorted to in the interpretation of Section 19 of Article XI of the Constitution of California.

In 1882, the Supreme Court of California, in speaking of this section, said:

> "Now, these provisions, as well as all other provisions of the Constitution, must receive a practical, common sense construction. They must be considered with reference to the prior state of the law, and with reference to the mischief intended to be remedied by the change."

People v. *Stephens*, 62 Cal., 233.

This principle of interpretation, recognized

in subsequent cases, has become a very part of the law itself (*Clary* v. *Rolland,* 24 Cal., 148), and excludes the application of a different rule, at least in so far as concerns those persons who acted thereon prior to the announcement of a different rule.

Indeed the decisions of this court limit the application of the rule of strict construction even in case of grants made by statute. Statutes even though they embrace grants are yet laws and must be construed so as to effect the legislative intent irrespective of common law rules.

> *Missouri, Kan. etc. R. R.* v. *Kan. Pac. R. R.,* 97 U. S., 497.

In *United States* v. *Denver, etc. R. R.,* 150 U. S., 14, this Court said:

> "When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted."

THE DECISION IN THE CASE AT BAR IS ERRONEOUS EVEN IF THE RULE OF STRICT CONSTRUCTION BE APPLICABLE.

The territorial extent of the franchise is so clearly defined that as to this there is no room for construction.

In *Clark* vs. *Los Angeles,* 160 Cal., 30, the Court said:

> "The express grant made by Section 19 is of the privilege, franchise or easement to place in the public streets of a City the conduits necessary or convenient for the business of supplying light or power to the City and its inhabitants. It may be accepted by any person, or by any Company duly incorporated to engage in that business."

This, we submit, is the correct construction of the Constitution. That instrument provided:

> "In any City where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual or any Company duly incorporated for such purpose . . . shall . . . have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such City and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes."
>
> Constitution of California, Sec. 19, Art. XI.

Thus, the offer covered all the streets of the municipality in so far as the use thereof was necessary for introducing and supplying the City and its inhabitants with water or light.

The grant was made, and the offer tendered, only to persons engaged in or corporations organized for the purpose of supplying the *City*

and its inhabitants with light or water. The duty of public service to the City and its inhabitants as a whole had to be undertaken before any grant was made. A person or corporation undertaking to supply selected persons or localities in a City could claim nothing under the grant. A corporation embarking in the business was obligated to extend its service as required by law, and could not limit the extent of its service in accordance with its own desires.

The franchise was co-extensive with the obligations it imposed.

The statutes of the State prescribed definite and severe penalties for those refusing to extend as therein directed. Civil Code of California, Sec. 549; Sec. 629 *et seq.* The offer made by the Constitution was co-extensive with the business in which the person to whom it was made was required to engage. The business was to supply the City and its inhabitants. The offer was of the use of the streets in so far as necessary to supply the City and its inhabitants. The very business in which the person to whom the offer was made was required to engage carried with it obligations. The obligations were to supply the City and its inhabitants with the prescribed service. It is very clear that this obligation to supply inhabitants was not limited to the then existing inhabitants, but included all those who might thereafter be inhabitants, and, for the conduct of the busi-

ness and the performance of the obligations incidental thereto, the right to use the streets was tendered. So far the constitutional provision is plain, and its meaning obvious.

The rule laid down by the Supreme Court of California.

The opinion of the Supreme Court of California does not deny or question either the extent of the offer, or the obligation assumed by the grantee as a condition to its acceptance. All this is ignored, the decision under review proceeding on other grounds. Thus, the Court says:

> "The grant or offer set forth in this section is in the most general terms. It is not specific with respect to either places or persons. It is not made to a particular corporation, nor is it confined to any particular City. It is a general offer to any person, and all corporations that may be organized for that purpose, and it embraces all cities in the State. It is specific only with regard to the kind of privilege offered, to wit, that of 'using the public streets' and 'laying down pipes and conduits therein . . . so far as may be necessary for introducing into and supplying said City and its inhabitants' with gas or water. No provision is made for any formal or written acceptance of the offer whereby a conveyance of a right to specified streets or within specified limits, or to all the streets of the particular City, might be manifested, which would be in the nature of a conveyance vesting the right in advance of, and regardless of, its use. No officer is empowered to take, receive, record or preserve such acceptance. The only means whereby an effectual manifestation of acceptance can be made is the act of taking possession and occupying the street for the purpose allowed. Then, and not before, is the acceptance complete. Thus far the public grant extends, thus far the public property in the street is burdened and diverted to another use, thus far

> the grant is accomplished. There is nothing in the language of the section which can be fairly said to express the intention that the right offered should take effect in any street before it is actually used, or should vest as to all of them the moment that the use is begun in good faith in one."

Matter of Russell, 163 Cal., 677-678.

This is the sum and substance of the opinion, and admitting the truth of many of the comments contained in the extract quoted, it is obvious that the result is due to a confusion of legal principles.

The measure of a grant is the grant itself, not the evidence of acceptance.

The measure of the grant is the Constitution, and the mere fact that that instrument does not declare what shall be evidence of acceptance is not material. The Court says that the sole evidence of acceptance is the use of the streets. This seems clearly erroneous, and is certainly not declared to be so either by the Constitution or the statutes of the State. There is no reason why any act clearly evidencing the intent to accept the grant and conduct the business is not equally efficacious, but assuming that there is no other act to which this character can be ascribed, still the extent of the evidence of acceptance cannot measure the grant.

Under elementary rules of law relating to contracts, a grant must be accepted according to its terms. The extent of the grant cannot be

measured by the acceptance, certainly not by the evidence of acceptance.

In order to constitute an acceptance, the assent to the terms of the offer must be absolute and unqualified.

> *Smith* v. *Hughes*, L. R. (1893), 1 Q. B. Div., 597.

In *Brogden* v. *Metropolitan R. R. Co.*, 2 App. Cas., 666, 691, Lord Blackburn, in discussing acceptance and evidence of acceptance by conduct, said:

> "I have always believed the law to be this: that when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound. If a man sent an offer abroad saying: I wish to know whether you will supply me with goods at such and such a price, and, if you agree to that, you must ship the first cargo as soon as you get this letter, there can be no doubt that as soon as the cargo was shipped the contract would be complete, and if the cargo went to the bottom of the sea, it would go to the bottom of the sea at the risk of the orderer."

If the principle applied by the Supreme Court of California in the case at bar were applied to the case cited by Lord Blackburn, the limited character of the act evidencing acceptance would operate to limit the contract, and could not as a matter of law constitute an acceptance. There is therefore absolutely no

basis for the claim that the grant should be construed to extend only to the extent to which the actual use of the street shows it has been availed of. The grant must be limited by its own language, and cannot be limited by the act of the person who has availed himself of it. By the language of the Constitution the grant is limited not by the extent to which the grantee has actually used the easement, but by the general obligation to supply the City and its inhabitants, which the grantee assumed at the time the grant was accepted.

This obligation in the case of water companies was defined by Section 549 of the Civil Code of the State of California:

If the words of the grant itself defining territorial extent were open to interpretation, the cases and decisions showing the extent of the obligations assumed by the grant remove any uncertainty.

> "All corporations formed to supply water to cities or towns must furnish pure, fresh water to the inhabitants thereof, for family uses, so long as the supply permits, upon proper demand therefor; and must furnish water to the extent of their means, in case of fire or other great necessity, free of charge. The Board of Supervisors, or the proper City or town authorities, may prescribe proper rules relating to the delivery of water, not inconsistent with the laws of the State."

and as said by the District Court of Appeal of California:

> "Upon a review and a careful consideration of all of the authorities bearing directly and indirectly upon the subject under discussion, we are strongly of the opinion that a water company, committed by its charter to the public service, is in duty bound to serve the whole public; and that when necessary

to such service the company's existing mains must be gradually extended so as to keep pace with the growth of the community which the company has undertaken to serve."

Lukrawa v. *Spring Valley Water Co.*, 15 Cal. App. Dec., 796 and 798.

With this duty, the right to use the streets was coincident.

We respectfully submit that a construction which limits the right to open and use the streets to such as have been actually opened and used, which makes of each trench a separate grant of a separate franchise, is a fantastic construction. Such an interpretation has been placed upon Section 19, not on account of anything contained in the section, not on account of the avowed public policy which that provision intended to declare and foster, but for very different reasons.

If the grantee of a franchise under Section 19 of the Constitution, as it stood prior to 1911, was obligated to extend his service throughout the City (and of this fact the constitutional provision, statutes in force and decisions leave no doubt), see

Civil Code of California, Sec. 549;
Civil Code of California, Sec. 526;
Lukrawa v. *Spring Valley Water Co.*, (Cal. App. Dec., Vol. 15, p. 793);

Bothwell v. *Consumers Co.*, 92 Pac., 533;
Pocatello v. *Standley*, 7 Idaho, 155;
Hyndman Water Co. v. *The Borough* (7 Pa. Sup. Ct. Rep., 191).

can it be doubted that a franchise, the ownership of which resulted in imposing such an obligation, of itself carried the right to perform the obligation without the necessity of taking and acquiring new and additional franchises? As pointed out by this Court in *Atlantic Coast Line* v. *North Carolina Com.*, 206 U. S., 1, "the duty to furnish necessary facilities is coterminous with the powers of the corporation." The converse is equally true.

But the Supreme Court of California declares that its decision is justified by the rule that public grants are to be construed most strongly in favor of the public, and against the grantee. Assuming that this rule of construction is applicable to a constitutional provision such as that under consideration, the result will not follow.

The fact that the authorities do not justify such a result even when the grant is made by a Town Council or other municipal authority, is recognized in the opinion of the Supreme Court of California, in the decision under review, where it is said:

Even if the rule of strict construction were applicable, the decision could not be supported on the theory on which it is based.

"There are cases involving grants of franchises

in streets of a particular City to a particular person or corporation, which hold that a right vests in all streets as soon as the franchise is accepted, and that such acceptance may be manifested either by a formal written acceptance or by the actual exercise of the rights granted thereby. We do not consider these decisions authority upon the question here involved. The distinction between such a special grant of a described right and the general offer here involved is obvious."

Matter of Russell, 163 Cal., 681.

The distinction is obvious, but it makes in favor of the grant in question and against the application of the rule invoked. The difference is that the grant here involved comes, without solicitation, directly from the sovereign, and is contained in the Constitution, instead of an ordinance passed by the municipal authorities, but the area of the grant is equally well defined, and the obligations of the grantee are coincident therewith. *In both cases the grant is confined to the limits of the municipality,* and to these limits the obligations of the holder of the franchise extend. It is this fact that clearly distinguishes the case from the cases of telegraph and telephone grants, where no area is defined, and no obligation to extend service imposed.

As said by this Court in *Grand Trunk* v. *South Bend,* 227 U. S., 544:

"It is said, however, that even if the City could

not prevent the use of the rails already laid, it could repeal so much of the ordinance as related to that part of the street on which the double track had not been actually built. But this was not a grant of several distinct and separate franchises, where the acceptance and use of one did not necessarily execute the contract as to the others not connected with the main object of the ordinance, and not at the time directly within the contemplation of the parties. *Pearsall* v. *Great Northern R. R.*, 161 U. S., 646, 673. This franchise was single and specific, and when accepted and acted upon became binding,—not foot by foot, as the rails were laid—but as an entirety."

This is equally true in the case at bar. The franchise was to serve the municipality and its inhabitants. This right was given and corresponded with the obligations assumed.

There is a common law rule relating to the construction of public grants that does apply to that under consideration. The rule is that if the King's grant admits of two interpretations, one of which will make it worthless, and the other will give it reasonable effect, then the latter is to prevail, for the reason that *"it will be more for the benefit of the subject and the honor of the King, which is to be more regarded than his profit."* 9 Co. Rep., 131a.

Respectfully submitted.

CHARLES S. WHEELER,
JOHN F. BOWIE,
Amici Curiae.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 415.

ROBERT RUSSELL, PLAINTIFF IN ERROR,

vs.

CHARLES E. SEBASTIAN, DEFENDANT IN ERROR.

EXPLANATION OF THE PURPOSE OF THE AMENDMENT OF 1911 TO SECTION 19 OF ARTICLE XI OF THE CONSTITUTION OF CALIFORNIA, PREPARED AND SENT WITH THE PROPOSED AMENDMENT TO EVERY VOTER, PURSUANT TO THE LAWS OF CALIFORNIA.

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Statement in Favor of Adoption of Senate Constitutional Amendment No. 49.

Senate Constitutional Amendment No. 49 amends section 19 of article XI of the constitution. The proposed section is radically different from the one it is designed to replace, and the broad ground upon which the amendment rests should be stated at the outset. The original section was designed to meet conditions which prevailed in this State

with regard to the operation of public utilities in cities at the time of the adoption of the new constitution, in 1879. But such conditions have changed in the thirty-two years elapsing since then, and an entirely new situation now exists regarding the subject to which this section relates. The proposed amendment is designed to provide for conditions as they now are, and as they will doubtless continue to be in the future.

In effect, section 19 of article XI, as it stands, provides that in any city which does not own and control its own waterworks or lighting plant, any individual or private corporation shall have the privilege of using the streets and thoroughfares of such city, and to construct pipes and conduits therein, for the purpose of operating water and lighting systems. The only conditions attached to this constitutional grant are: (1) that the work of laying pipes or conduits, or installing appliances in the city streets, shall be under the direction of the superintendent of streets; (2) that such work shall be subject to such regulations as the city may prescribe for damages and indemnity for damages, and (3) that the municipal government shall have the right to regulate the charges for water or light furnished by such person or company.

An examination of the proceedings of the convention which framed the constitution of 1879 will show that the purpose of this section was to remedy a most vexatious condition which then existed in all the larger cities of the State. It was notorious that the supplying of water and light were private monopolies in all such cities, and that, owing to the absolute control over municipal councils by the persons operating these monopolies, it was impossible for any other persons to get franchises to conduct competing systems. This situation was a public scandal, and the water and gas companies of that day simply used their power to prevent, and they did prevent, any franchise being granted that would break their monopoly, or enable others to enter into competition with them. The people were so desirous of ending this

odious system that they were willing to place in the constitution this section, which gave to any one the absolute right, without compensation and without conditions other than as above stated, to operate water and lighting systems in cities. It was thus confidently hoped that these public utilities would be placed upon a competitive basis, that burdensome gas and water monopolies would be broken, and that great benefit would thereby inure to the people.

The result, however, has been a distinct disappointment, like many other attempts to remedy economic conditions by force of statutes. The sequel has shown that to give the *right* to establish competing water or gas systems *by law*, is one thing; *to actually establish and maintain them*, as against already intrenched monopolies, is quite *a different thing*. The fact is that the supplying of gas, water, electric light, and any other like public service, is by its very nature monopolistic, and the true remedy, so far as any substantial benefit to the people is concerned, is to encourage the furnishing of these public necessities by municipal corporations themselves. This fact was not realized so clearly thirty years ago as it is to-day. In spite of this free and direct gift of franchises for water and lighting systems, the cities are still in the hands of water and lighting companies that are private monopolies in fact, if not in name, except in those cases where cities have established their own systems. Even where there are several private lighting or water companies operating in the same city, the companies are not rivals in any real sense. If a serious competitor appears, it is hampered or crushed by the superior commercial or political influence of the water, gas or electric companies that have already occupied the city streets and established their connections; or, if such rival be strong enough financially to hold its ground, the water, gas or electric companies speedily admit it to their circle, and make an amicable division of the city territory between themselves, by which they agree not to invade each other's preserve. Therefore, unless a more effective remedy is devised than is afforded by

section 19, article XI, in its present form, the monopolistic conditions that were so unpopular thirty years ago will still remain, although slightly in a different shape. So much for the general purpose which the authors of the original section had in mind, and the practical results of its operation. This section was amended in 1885; the amendment, however, simply consisted in striking out a provision which had no relation to the subject we are discussing.

But there have been other unfortunate results from this section. The control by cities over water, gas and electric companies, with respect to the use of the public streets, has been extremely weak and unsatisfactory. The only power which cities have in this regard is that the physical work of installing poles or wires, or tearing up streets for pipes and conduits, must be done under the direction of the city officer who has charge of the streets, and that the city may compel the observance of rules and regulations for the payment of damages occasioned by such work, and indemnity therefor. Cities generally, under their constitutional power to make local and police regulations, require all persons who tear up pavements or make excavations in public streets to conform to their ordinances prescribing the time when, the place where, and the manner in which such work shall be done. Persons and companies operating water, gas and electric lighting systems, however, are practically exempt from such regulations. The limitation in the present section that the laying of water and gas pipes and conduits shall be "under the direction" of the municipal officer who has charge of the streets does not mean much in practice, for this "direction" is clearly limited to the doing of the work itself, and does not imply a right to control the time or place when such work shall be done, or any effective method of regulating the method thereof.

The supreme court of this state has construed this section of the constitution on several occasions, and it has held that when the constitution designates "damages and indemnity for damages" as the subject upon which the municipality

may prescribe regulations in regard to laying pipes and conduits, it places a limitation upon the authority of the municipality over the matter, and further, that such designation is *a prohibition from prescribing any other regulations connected with the exercise of the privilege.* Section 19 of article XI is a direct grant to the persons and corporations specified therein of the right to lay pipes, erect poles, and construct conduits in the streets. The supreme court has further held that when the sovereign authority of the state has created a right, and expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality where such right is sought to be exercised to impose any other conditions to its exercise.

Therefore, the various cities and towns, at least those which do not own and operate water, gas and electric lighting systems themselves, have no effective control over the use of the streets by gas, water or electric light companies, for such companies may and do dig up the streets at their own sweet will, at any time, in any manner, and at any place. It is a matter of common knowledge that the indiscriminate manner in which streets, and particularly paved and other highly improved streets, are torn up by gas, electric light and water companies, and the very indifferent way in which they are replaced, is a perpetual source of public complaint and annoyance in cities. While cities may make regulations for damages and indemnity for damages, this is very unsatisfactory, for the collection of damages for poor work done in repairing streets or for injuries suffered thereby is a troublesome thing, and does not cure the evil. The remedy lies in giving the cities direct control over such work so that it may be properly done in the first place, thus preventing any cause for damages, and not in a mere right to sue for an indemnity or collect damages afterwards, as is now the case. To cite one instance of the defects of the present system: Attempts have been made in several cities with scant success, to require trenches to be dug and pipes and conduits to be laid before streets are paved. But the

companies are not obliged to do this; they can wait upon their own pleasure in this regard, and the general experience is, that no sooner is a costly pavement laid or other improvements made than the work of destruction forthwith begins, by the tearing-up process, for pipes and conduits. This is a constant source of public inconvenience and expense, and is the direct and natural outgrowth of the want of authority in municipalities to regulate the subject. To say that the work must be done "under the direction of the superintendent of streets" and that this should be a sufficient protection to the public, is to miss the point of the difficulty entirely. The city should have the power to prescribe when such work shall be done, and how it shall be done, and to regulate it so as to insure good work with the least public inconvenience. If this amendment is approved, gas, electric lighting and water companies will be required to observe such rules and regulations as may be prescribed by the municipality before and while they are laying pipes and conduits, or erecting poles or stringing wires, and any other system, such as the loose one now in force, will be a failure.

Considering now the proposed amendment, as an entirely new section, and upon its own merits, we urge the following in its behalf: It will settle, beyond all doubt, the question whether municipalities may own and operate public utilities. The first sentence of the amended section is a complete and direct grant of power in this regard. Under the authority granted by this amendment, cities may construct works for supplying their inhabitants with light, water, power, heat, transportation, telephone service or other means of communication, or they may acquire such works by the purchase of existing plants. The right of individuals or private corporations to operate these utilities will not be taken away, but such operation and the manner of using the public streets must be in accordance with such regulations as the cities may prescribe in their charters. The right to regulate charges will be retained by cities. And, lastly, a very im-

portant provision authorizes any city to furnish public utilities to inhabitants outside of its boundaries; but it cannot furnish such services to the inhabitants of any other municipality owning or operating works supplying the same service to its inhabitants, without the assent of such other municipality, expressed by ordinance.

This amendment is offered for the purpose of strengthening the position of cities in acquiring and operating those utilities which are now recognized as public necessities; and for the purpose of placing individuals or private corporations which furnish such services under reasonable control by the cities in which they operate, thus correcting the evils that have been referred to. The amendment should be adopted.

LESTER G. BURNETT,
State Senator, 25th District.
LESLIE R. HEWITT,
State Senator, 38th District.

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IN THE

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OCTOBER TERM, 1913.

~~No. 415.~~

Robert Russell,
Plaintiff in Error,
vs.
Charles E. Sebastian,
Defendant in Error.

No. 415.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1913.

No. 413.

Robert Russell,
Plaintiff in Error,
vs.
Charles E. Sebastian,
Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

INTRODUCTORY STATEMENT.

This case comes on before this court on a writ of error directed to the Supreme Court of California, to review a decision of the Supreme Court of California by which the plaintiff in error, Robert Russell, was refused a discharge upon a writ of *habeas corpus* and was remanded to the

custody of the defendant in error, who was chief of police of the city of Los Angeles. The case involves the right of the city of Los Angeles to exact franchises from gas companies for the use of the streets; this, in turn, involves a construction of section 19 of article XI of the constitution of the state of California.

STATEMENT OF FACTS.

Robert Russell, plaintiff in error, was the employe of a corporation known as the Economic Gas Company, incorporated under the laws of the state of California, and on the 27th day of February, 1912, he was engaged in making an excavation in a street of the city of Los Angeles for the purpose of laying gas pipes, such street not having been used theretofore for such purpose by his employer. He was arrested and charged in the police court of said city with a violation of ordinance No. 24,410 (New Series) of the city of Los Angeles, in that he, the said Robert Russell, did wilfully and unlawfully excavate in a public street of said city, without first having obtained a permit from the board of public works of said city, which permit could have been issued only to a corporation or individual having a franchise from said city. The Economic Gas Company asserted its right to occupy the streets of Los Angeles without a franchise and to excavate, from time to time, as it deemed necessary for the ex-

tension of its mains, in any of said streets, making the further claim that it had a perpetual right to use all of the streets of the city under section 19 of article XI of the constitution as such section was written prior to an amendment to the same of October 10th, 1911. The constitutional section as it was formerly written provided that the streets of the cities of the state might be used by individuals or corporations for the purpose of furnishing fresh water and illuminating gas, to the inhabitants thereof. This section was changed on October 10th, 1911, by a vote of the people of the state, and it was contended by the Economic Gas Company that it had a right to continue its excavations in the streets by virtue of the terms of the former provision of the constitution inasmuch as it had incorporated and engaged in the business of furnishing gas before the amendment to the provision.

The city of Los Angeles, through its chief of police and his attorneys, maintained, on the other hand, that the amendment to the constitution recalled any former privileges extended to gas and water companies to use the streets except as to those streets actually used before the constitutional amendment took effect.

In addition to the other contentions of the plaintiff in error, he asserted that the terms of the new section of the constitution, by the force of their own expression, were in themselves a new and

direct grant to the public service corporations of the state to use the streets. The plaintiff in error, after arrest on the 27th day of February, 1912, was held in confinement until released upon bail upon the issuance of a writ of *habeas corpus* by the Supreme Court of the state. The writ of *habeas corpus* was duly issued, and upon a return made to the court, and after a full consideration, the petitioner, namely, Robert Russell, plaintiff in error, was duly remanded to the custody of the chief of police of the city of Los Angeles, defendant in error in this proceeding. The propriety of the city's action in requiring a franchise to excavate in the street was sustained by the Supreme Court of California and the new constitutional provision was adjudicated as a withdrawal of the right existing under the old provision, by which lighting companies were permitted the unlimited use of the streets. On December 18th, 1912, a petition directed to the Honorable William H. Beatty, chief justice of the Supreme Court of California, was filed with that court. Upon filing this petition and an assignment of errors, an order was duly made by said Chief Justice William H. Beatty, and a writ of error was directed to said California Supreme Court, the argument upon which is made in this brief. A citation directed to the defendant in error was served on him and an acknowledgment thereof made by John W. Shenk, then city attor-

ney of Los Angeles, and Ray E. Nimmo, city prosecutor of Los Angeles, attorneys for defendant in error, which said citation was made returnable February 8th, 1913.

A motion was made before this court to advance this cause upon the calendar and on October 20th, 1913, the motion was duly granted and the case assigned regularly for hearing on January 5th, 1914.

BRIEF.

We find that the opinion of the Supreme Court of California in this case (Matter of Russell, 163 Cal. 668) states the claims of plaintiff in error concisely, and it follows that our purpose is to demonstrate that they are untenable. The claims of plaintiff in error are set out in the early part of the opinion of Mr. Justice Shaw in that case. The first claim was, as mentioned in the introductory statement heretofore, that the constitutional amendment of 1911 was in itself a grant of a right to use the streets, or, as Mr. Justice Shaw has said: "He claims, 1. That the gas company is directly authorized by said amendment to lay gas mains in the street as part of its work for supplying gas, and, hence, that the city cannot forbid it from so doing." This claim was a claim based upon construction and inasmuch as the California Supreme Court has spoken upon this matter, it should be final. It is, of course, a non-

federal question and is not raised by the plaintiff in error before this court. For that reason we will give no further attention to this phase of the case as plaintiff in error has not pressed it.

The Federal Question.

Mr. Justice Shaw, of the California Supreme Court, in his opinion also outlined the assertions of plaintiff in error in this case in such a way that we feel we can most concisely place the matter before this court in his language. He stated the claim of the gas company as follows:

"That because of the fact that it had established its works, had laid some mains, and had begun supplying gas before the adoption of the amendment, it had a vested right to extend its mains and lay them in streets not before used by it for that purpose, a right which the city could not restrict by ordinance, nor the people take away by constitutional amendment."

In the statement of his case, page 7 of the brief of plaintiff in error, he has said that by reason of the construction of the Economic Gas Company's plant, with the design and intention of supplying a larger territory than it was supplying on the date of the change in the constitution, the expense of construction was far greater than would have been otherwise necessary. This and the language which follows seems to pre-suppose that it will in the future be impossible for the company to extend its mains. We feel constrained at the

outset to brand this assumption as incorrect and not justified from the facts. There is no reason why the mains of the gas company cannot be extended in the usual way by franchise. The transcript in this case sets out in full the franchise ordinance of the city of Los Angeles and the ordinance known as the excavation ordinance. All that is necessary to be done to continue the work under the terms of these ordinances is to get the necessary authority by preceding it with the essential formalities of application, bid, and acceptance.

Comment on Specification of Error.

Under the terms of subdivision 3 of rule 21 of this court it is not necessary for the defendant in error to set forth any specification of error, but we want to comment somewhat upon the specification of error contained in the brief of plaintiff in error.

It will be noted in the specification of error in the brief of plaintiff in error that there were apparently fourteen specifications relied on. These specifications of error seem to be taken *verbatim* from the assignments of error contained in the transcript in this case, except that the fourth assignment of error is omitted. This assignment of error treated of the non-federal question of the construction of the constitutional amendment, and, we assume, for that reason has been omitted

are not of sufficient importance to take up individually any further than to say that they all are based on the substance of the fifth assignment. The fifth assignment is to the general effect that the California court erred in holding that the Economic Gas Company did not have a franchise under the constitution of the state of California, article XI, section 19, as the same existed prior to the amendment of October 10, 1911. A careful inspection of these assignments will reveal that they merely state the position of plaintiff in error in varied ways.

I.

The Terms of Section 19 of Article XI of the California Constitution, as Such Section was Written Prior to the Amendment of October 10, 1911, Did Not Work the Grant of a Franchise to Water or Lighting Companies as to Any Streets Not Occupied Before Said Amendment.

In considering this question we must refer necessarily from time to time to the wording of this amendment to the California organic law, and a comparison with the original text of section 19 is desirable for all purposes. We are, therefore, setting forth section 19 as it read before and after amendment, in parallel columns:

Sec. 19 of Art. XI, prior to its amendment:

"In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas light, or other illuminating light or with fresh water for domestic and all other purposes, upon the con-

Sec. 19 of Art. XI, as amended on October 10, 1911:

"Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries: provided that it shall not furnish any service to the inhabitants of

dition that the municipal government shall have the right to regulate the charges thereof."

any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

One of the first considerations in deliberating upon the operation of any law is to learn, if possible, the conditions which the framers of the law sought to remedy. An inspection of the former section discloses that its specific purpose was to permit the use of the streets by gas companies without franchises. This provision, as it is well known, was inserted in the constitution of 1879 to afford the people a relief from the monopolistic aggressions of water and gas companies in cities. The supplying of water and gas in cities is a paramount necessity, and, of course, the expression of section 19, as it previously read, was designed to, and did, give the opportunity to any person or corporation to serve the inhabitants of the city without being required to obtain the consent of the municipal council to use the streets. But public utilities are by nature monopolistic, and must ever be such, and it appears that the section did not afford the relief it was designed it should, the reasons for which we are not here concerned with. This conspicuous fact stands out, however, from the suggestions we have

offered: Section 19 as amended withdrew offered privileges which had not been accepted at the time of the withdrawal. The only question, then, is whether there was a contract as to all streets created by the offer, or whether the contract was only created as to the streets occupied pursuant to the offer.

Plaintiff in error has said that the obligations of a valid contract cannot be impaired by the adoption of a new constitution any more than it can be impaired by the enactment of a law by the legislature, citing authorities. With this point we take no issue and will not further discuss it.

On presentation of the question, which we are now discussing, before the California court we took occasion to say that the petitioner (plaintiff in error) necessarily claims that the rights and privileges conferred upon the Economic Gas Company by the former section of the constitution were without limit in point of time; or, in other words, that said section granted rights in perpetuity, and, second, that contractual and vested rights were acquired which were not meant to be limited to streets actually occupied by the pipes of the company at the time section 19 was amended, but extend to and include all streets of the city. As the courts have a strong leaning toward strict constructions as against grants of special privileges from public bodies, they have

always spoken strongly against rights in perpetuity, and in this case the claim of plaintiff in error to rights in streets not used at the time of the amendment necessarily includes a right in all streets in perpetuity. We will discuss this more fully at a later point.

A lighting company which constructed its system under the provisions of section 19 of article XI as it was formerly written, obtained no vested rights as to streets not used. As to such streets there could be no contract.

St. Louis v. Western Union Tel. Co., 149 U. S. 465;

Pearsall v. Great Northern R. R. Co., 161 U. S. 646;

Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379, 385;

N. W. Tel. Ex. Co. v. City of St. Charles, 154 Fed. 386;

Muskogee Natl. Tel. Co. v. Hall, 64 S. W. 600;

Belleville v. Citizens Horse Ry. Co., 152 Ill. 184;

Sunset Tel. & Tel. Co. v. Pasadena, 118 Pac. 796, 161 Cal. 265;

Western Union Tel. Co. v. Hopkins, 116 Pac. 557; 160 Cal. 106.

Stockton Gas Co. v. San Joaquin Co., 148 Cal. 315;

3 Elliott on Railroads, section 1079;

Atchison Street Ry. Co. v. Nave, 38 Kans. 752;
Nellis on Street Railways, section 50;
Blocki v. People, 220 Ill. 444;
Matter of Russell, 163 Cal. 668.

It is indeed, as Mr. Justice Shaw of the California Supreme Court has well said, a well-established principle of construction that grants made to private persons or public service corporations of rights belonging to the public are to be construed most strongly in favor of the public. The theoretical foundation upon which our republic rests is the subordination of the individual privilege to the welfare of the people, who, collectively, are sovereign and manifest their sovereignty by a jealous watch upon the encroachment of personal license or special privilege. The constitution provides protection to the individual, but the sovereign power of the people is supreme in all the relations of the citizen to the state, except in such cases as the constitution gives him immunity. It is not necessary, in our judgment, to press this point any more forcibly here, it being a well established principle. We are satisfied from a previous review of this topic, that these elementary rules of construction are well-grounded in authority. However, the presentation of this principle in this case should be important in view of the issue between counsel as

to the interpretation to be given the constitutional provision as it was written. Plaintiff in error must predicate his contention entirely upon the theory of a valid and enforceable contract between the Economic Gas Company and the city of Los Angeles, or the people of the state. This contract must embrace the essentials of legal agreements, else it cannot be a valid and enforceable pact productive of some value to both parties thereto. We have already outlined the reason for the granting of the potential right to lighting companies by the former constitutional provision, as a step intended to discourage monopolistic aggression. It was expected that the people at large in the state had something to gain, else the offer of the use of the public streets would not have been thus made. The public expected to benefit by an enforced competition among the lighting companies, and so, if such companies embraced the terms of the public's offer, there would be a definite benefit accrue to the people of the state. A consideration is necessary to complete a contract, and there must be a contract, the obligation of which is impaired, or plaintiff in error's argument will fall. How can there be a contract as to streets not occupied by the lighting companies, when the benefit or consideration flowing to the people from the use of the streets had not yet assumed form? There could be no advantage of competition acquired by those in

whose streets mains were not yet installed. It seems so elementary in principle, that argument should be futile to convince one otherwise. The only consideration which can be suggested to support the privilege extended by the constitution lies in the duty of the person accepting the use of the streets to furnish water or light. The right and duty are commensurate. There is no consideration from a promise where no benefit is conferred upon the one making it, nor detriment suffered by the promisee, and the promissor neither undertakes to do anything which he is not bound to do, nor forbears from doing something which he has a right to do.

> 9 Encyclopedia of Law and Procedure (Cyc.) 316.

It makes no difference that the one to whom a naked promise was made has suffered damage by relying on it.

> 9 Encyclopedia of Law and Procedure 317.

This principle is emphasized in Pearsall v. Great Northern Ry. Co., *supra.*

Contractual rights cannot be enforced until they become vested by acceptance. In the case just above cited, the Great Northern Rwy. Co. was shown to have been organized under the act of the legislature of the territory of Minnesota in 1856. By the original act the territory granted to the company the right to be a corporation and

to construct a railroad and to connect its roads by branches with other roads, and "to connect with any railroad running in the same direction with this road, where there may be any portion of another road which may be used by this company." By an amendatory act, said corporation was authorized to consolidate any portion of its road or property with the franchises of any other road and to consolidate the whole or any portion of its main line or branches with the rights, powers, franchises, grants and effects of any other railroad. In 1874 the state of Minnesota passed an act which provided that no railroad corporation, etc., should consolidate with, or lease, or purchase, the works or franchises of, or in any way control any other railroad company having a parallel or competing line. The contention of the railroad company was that the original act incorporating it and giving it powers to consolidate, gave it a vested right which could not be impaired. Mr. Justice Brown rendered the opinion of the court, and reviewed the many decisions sustaining the inviolability of corporate charters and dilating upon the sanctity of charters vesting in grantees the title of property, but after an exhaustive discussion of this subject, he said that these decisions were all in cases in which the title to the property had become vested. The court continued, and from the opinion the following excerpts are taken, to bring out the force of

our contention that rights potential, as distinguished from rights perfected by user, are always revocable because supported by no consideration.

The court said, at page 664 *et seq.*:

> "Hence, an exclusive right to enjoy a certain franchise is never presumed, and unless the charter contain words of exclusion, it is no impairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed. This principle was laid down at an early day in the case of the Charles River Bridge v. Warren Bridge, 11 Pet. 420, and has been steadily adhered to ever since. Turnpike Company v. The State, 3 Wall. 210; Providence Bank v. Billings, 4 Pet. 514; Pennsylvania Railroad v. Miller, 132 U. S. 75. * * *
>
> "In obedience to the same principle it has always been held that the legislature may repeal laws authorizing municipal subscriptions to railways, though such laws were in existence at the time the railway was chartered, and may be supposed to have influenced the promoters and stockholders of the road in undertaking its construction. And even if there has been a public vote in favor of such subscription, such vote does not itself form a contract with the railway company protected by the constitution, the court holding that until the subscription is actually made the contract is unexecuted. Aspinwall v. Daviess County, 22 How. 364; Wadsworth v. Supervisors, 102 U. S. 534; Norton v. Brownsville, 129 U. S. 479; Concord v. Portsmouth Savings Bank, 92 U. S. 625; Falconer v. Buffalo & Jamestown Rail-

road, 69 N. Y. 491; Covington & Lexington Railroad v. Kenton County Court, 12 B. Mon. 144; Wilson v. Polk County, 112 Missouri 126.

"The contract protected by this clause must also be founded upon a good consideration. If it be a mere nude pact, a bare promise to allow a certain thing to be done, it will be construed as a revocable license. Thus, in Christ Church v. Philadelphia County, 24 How. 300, the legislature of Pennsylvania enacted that the property of Christ Church Hospital, so long as the same should continue to belong to the same hospital, should be and remain free from taxation. In 1851 they enacted that all property then exempted from taxation, other than that which was in the actual use and occupation of such association, should thereafter be subject to taxation. It was held that the original concession of the legislature exempting the property from taxation was spontaneous, and no service or duty or other remunerative consideration was imposed upon the corporation, and hence that it was in the nature of a privilege or license, which might be revoked at the pleasure of the sovereign. * * *

"Under the broad powers conferred by the amended act of 1865, it is probable that this arrangement might be lawfully made; and the question is whether an unexecuted power to make such arrangement is a 'vested right' within the meaning of section 17 of the original act. It is possible that, if this arrangement had been actually made and carried into effect, before the acts forbidding the consolidation of parallel or competing lines had been passed, the rights of the parties thereto would have become vested, and could not be

impaired by any subsequent act of the legislature. *But the real question before us is whether a bare unexecuted power to consolidate with other corporations, a power which, if it exists as claimed by the defendant, would authorize it to absorb by successive and gradual accretions the entire railway system of the country, is not, so long as it remains unexecuted, within the control of and subject to revocation by the legislature, at least, so far as it applies to parallel or competing lines.* * * *

"But where the charter authorizes the company in sweeping terms to do certain things which are unnecessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, *so long as it is* unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked, if a possible exercise of such power is found to conflict with the interests of the public." (Italics ours.)

In the case of St. Louis v. Western Union Tel. Co., 148 U. S. 92, an ordinance authorizing the use of the streets of the city of St. Louis by telegraph and telephone companies was amended by an ordinance compelling all such companies, not taxed on a gross income for city purposes, to pay to the city, for the privilege of using the streets, the sum of five dollars a year for each pole erected or used in the streets. This court reversed the decision of the Circuit Court which held that the second ordinance created a license tax on inter-

state commerce. In this same case (149 U. S. 465), a rehearing was given and the petition of the defendant in error was denied, the same position being taken by this court. This court, in giving its opinion upon the application for a rehearing, gave utterance to the following language which is directly in point in the case at bar. We know of no other citation more directly appropriate to this case than the language which we are presenting. The court said:

> "The law in force in Missouri from 1866 gives certain rights in streets to 'companies organized under the provisions of this article.' Of course, the defendant, a corporation organized under the laws of the state of New York, can claim no benefit of this. It is true that, prior to that time, and by the act of November 17, 1855, the right was given to every telegraph corporation to construct its lines along the highways and public roads; but that was superseded by the legislation of 1866; *and when in force it was only a permission, a license, which might be revoked at any time; and further, whatever rights, if any, this defendant may have acquired to continue the use of the streets already occupied at the time of the revision of 1866, it cannot with any show of reason be contended that it received an irrevocable power to traverse the state and occupy any other streets and highways.*" (Italics ours.)

It was said in Blair v. Chicago, 201 U. S. 400, that the decision of a state court is not binding on the Federal Supreme Court in determining

whether a contract was made by a legislative action which is entitled to protection under the contract clause of the United States constitution, yet the federal court will consider decisions of state supreme courts on that question. In this case we consider that the California Supreme Court has rendered an excellent exposition of this subject of vested rights and the logical expression of the court, combined with an exhaustive resume of authorities, warrants, in our belief, a review of the opinion. It was said by Mr. Justice Shaw:

> "The grant or offer set forth in this section is in the most general terms. It is not specific with respect to either places or persons. It is not made to a particular corporation, nor is it confined to any particular city. It is a general offer to any person and all corporations that may be organized for that purpose and it embraces all cities in the state. It is specific only with regard to the kind of privilege offered, to-wit: that of 'using the public streets' and 'laying down pipes and conduits therein * * * so far as may be necessary for introducing into and supplying said city and its inhabitants' with gas or water. No provision is made for any formal or written acceptance of the offer whereby a conveyance of a right to specified streets or within specified limits, or to all the streets of the particular city, might be manifested, which would be in the nature of a conveyance vesting the right in advance of, and regardless of, its use. No officer is empowered to take, receive, record, or preserve such acceptance. The only means whereby an effectual manifestation of acceptance can be

made is the act of taking possession and occupying the street for the purpose allowed. Then, and not before, is the acceptance complete. Thus far the public grant extends, thus far the public property in the street is burdened and diverted to another use, thus far the grant is accomplished. There is nothing in the language of the section which can be fairly said to express the intention that the right offered should take effect in any street before it is actually used, or should vest as to all of them the moment that the use is begun in good faith in one.

"It is an established principle of construction, applicable to constitutions as well as to statutes, that grants thereby made to private persons or public service corporations of rights belonging to the state or to the public 'are to be construed most strongly in favor of the public.' (Clark v. Los Angeles, 160 Cal. 39, (116 Pac. 725); Sunset etc. Co. v. Pasadena, 161 Cal. 273, (118 Pac. 790).) 'Only that which is granted in clear and explicit terms passes' by such grant. 'Nothing passes by implication.' (Knoxville Water Co. v. Knoxville, 200 U. S. 33, (50 L. Ed. 353, 26 Sup. Ct. Rep. 224).) The grant to be made effective by actual use and acceptance of the constitutional offer, is not, under the rule of construction just stated, to be carried further by implication. It is a necessary conclusion, therefore, that the vested right of the Economic Gas Company in the streets of Los Angeles at the time the constitution was changed, extended so far only as its actual occupancy and use of the streets then extended. The people had the right, at any time before acceptance, to repeal the provision and withdraw the offer. The invest-

ment of money in gas works designed to supply additional territory was not an acceptance and could not operate as an estoppel against the state or the people to divest them of their sovereign authority to change the constitution. The company must be deemed to have had knowledge of this sovereign power and to have assumed the risk that the power might be exercised before it had further availed itself of the existing offer. * * *

"There are expressions, however, in several of the decisions which show that the understanding of the court has been that the acceptance did not become complete otherwise than by actual use, nor extend further than such use, and that the right vested at the time of such use and not before. In Stockton etc. Co. v. San Joaquin Co., 148 Cal. 313, (7 Ann. Cas. 511, 5 L. R. A. (N. S.) 174, 83 Pac. 54, 318), speaking of such a franchise we said: 'It is only acquired when the constitutional grant is actually accepted; when the pipes and conduits for gas or the electric poles are laid in or erected on the streets of the city.' Corporations having the capacity to take 'do not acquire it until they have accepted it by proceeding to its actual exercise.' Such franchise 'is indissolubly annexed to the street of a city in and upon which it is exercised.' In South Pasadena v. Pasadena, 152 Cal. 586, (93 Pac. 490), we said: 'This right, when made available by actual possession and use, is a species of real property, appropriately designated as a franchise.' The point decided in Western Union Tel. Co. v. Hopkins, 160 Cal. 111-122, (116 Pac. 550-564), is, in principle, decisive of the precise question here involved. Referring there to

the similar legislative grant to telegraph companies to construct telegraph lines along the highways of the state, contained in section 536 of the Civil Code, the court says it is similar to the constitutional provision in question here, and that it 'would vest only when actually accepted by the exercise of the right granted,' (p. 111); that 'the exclusive occupation by a company of portions of public highways for the authorized purpose is an acceptance by it of the offered franchise,' (p. 117); that the statute was a grant of rights in streets 'which to the extent that they were accepted and availed of by any company, constitute a franchise granted by the state and accepted by the company,' (p. 119); and again: 'To the extent that the offer of the state contained in the section was accepted by a telegraph company by the actual occupation of a highway prior to any repeal, modification or suspension of the section, no right of revocation having been reserved, such telegraph company has vested rights that cannot be taken away by the state or city without compensation,' (p. 120); and further: 'So far as any company had not at such time availed itself of and thus accepted the provisions of section 536, there was no "existing" grant or franchise to be annuled, and there was never any "special" or "exclusive" privilege given by the section,' (p. 123.) The part of the decision last quoted relates directly to the question whether the telegraph company, under the general legislative grant to all companies in any street, acquired any right in the streets in which it had not erected poles or strung wires prior to a repeal of the section, which such repeal would divest. It is practically the same ques-

tion as that presented here and is authority for the proposition that the gas company had no vested rights in streets not previously used for the laying of gas mains. To the same effect are St. Louis v. Western Union Tel. Co., 149 U. S. 465, (37 L. Ed. 810, 13 Sup. Ct. Rep. 990); Northwest etc. Co. v. St. Charles, 154 Fed. 388, and Muskogee etc. Co. v. Hall, 4 Ind. Ter. 18, (64 S. W. 603)."

In the case of the Northwestern Telephone Exchange Co. v. City of St. Charles, 154 Fed. 386, the court considered the effect of a withdrawal by the state of certain rights similar to these asserted by plaintiff in error. The court said:

"Under this amendment of March 7, 1881, there was granted to telegraph and telephone companies the right and privilege of placing their poles bearing wires upon the public highways of the state, provided that it should be exercised in such a way or manner as should not in any way interfere with the ordinary travel of highways. This, in my opinion, constituted a license to telegraph or telephone companies to make such use of the highways of the state as was provided in that act; and in all cases where that was done while that act was in force, in the language expressed in the act of March 7th, 1881, and moneys expended by the corporation placing the poles and wires upon the highways, it would be equivalent to a contract on the part of the state that such corporation should have the right to continue to use the poles and wires so constructed and erected, and, of course, to make the necessary repairs from

time to time to keep the line in efficient condition.

"*But I cannot assent to the idea that the offer of this privilege or license took away from the state in any manner the continuing power of absolute control over the use of the highways and streets in the state.* It had the right, so far as companies had not taken advantage of the license that was offered, at any time to change the terms upon which it would assent to the use of the streets for telegraph or telephone purposes, or to abolish those privileges altogether. There would be nothing in the shape of a contract between any such company and the state, *except so far as the companies had used that license and expended money upon it; and with respect to all other streets and highways in the state such company would have no continuing license or control after a change in the law relating to the subject.* Therefore I think it was within the power of the legislature, after the passage of the act of March 7, 1881, even although the complainant had before that time formed the idea of covering the state and its cities and villages with telephone lines and exchanges, *so far as that had not been done in the actual use of license or privilege theretofore granted,* to make a change; and thereupon the license, so far as not used would cease." (Italics ours.)

In the case of the Muskogee National Tel. Co. v. Hall, 64 S. W. 600, an exclusive franchise of a telephone company secured from the Creek Nation was involved. The defendant had started to erect a telephone system under rights asserted to have been secured from the town and approved

by the commissioner of Indian affairs. Among the questions considered by the court was the claim that the act of congress of March, 1901, conferring upon the secretary of the interior authority in the matter of granting rights of way for telephone lines in the Indian Territory, was unconstitutional as impairing vested rights acquired by the telephone company. It was held, first, that the Creek Nation had the power to grant the company the exclusive franchise; second, that the act of congress in question transferred all control over highways, so far as telephone lines were concerned, from the Creek Nation to the secretary of the interior; and third, that there could be no constitutional objection to the act as impairing the vested rights of the company *"respecting territory not occupied by it, and upon which it had expended no money."* (Italics ours.)

The two California cases, of Sunset Tel. and Tel. Co. v. Pasadena, and Western Union Tel. Co. v. Hopkins, previously cited, are strongly in point. The California Supreme Court in the latter case said that so far as any company had not availed itself of a section of the Civil Code of the state, which section provided for certain rights to telegraph companies, there was no existing franchise or grant to be annulled by a constitutional provision in conflict therewith. These

cases will be discussed more fully later on in distinguishing the cases of plaintiff in error.

In the case of the Village of London Mills v. The Fairview-London Tel. Circuit, 105 Ill. App. 146 and 150, the court held that the authority given to a telephone company to erect its poles in certain designated streets was a license, and did not become a vested right until the terms had been accepted by user. It is the sense of the opinion that inchoate rights to use the streets are licenses until used, but when used become irrevocable and vested rights.

II.

Contractural Obligations.

Each party to a contract has a right and an obligation. We believe that it is inconsistent with the theory of contractual rights and obligations to maintain that a corporation where given a franchise, or where exercising a right, may be the only one to say where its services shall be performed. The position of the Economic Gas Company in this case is that it can continue indefinitely to use all or any of the streets of Los Angeles as it pleases. May it not then be said that, as a public utility is under the obligation to serve the public indiscriminately, such gas company could then be compelled to serve its patrons any place in the city upon demand? We main-

tain that the city could, with as much force as plaintiff in error makes his present contention, say, "You must serve the consumers in the southwest section of the corporate area immediately. This will require you to conduct your mains seven miles from the present location, so begin at once." Plaintiff in error maintains that because the Economic Gas Company built a gas plant and used some streets of the city by virtue of the old constitutional provision, it has evidenced thereby its acceptance of the offer made by the people of the state through their constitution to use any streets of the city, and that such acts of the gas company are equivalent to the consummation of a binding contract between the people of the state and the company, as much so as if such contract had been reduced to writing and solemnly executed and acknowledged by both parties to it. As we see it, this is clearly a position out of congruity with fairness to all concerned. Surely, if the gas company has gained a definite right to streets not used, the persons in those streets should have a definite right to be served by the gas company upon demand. Where a corporation is given a blanket franchise in all streets of the city, it is the contemplation of all parties concerned that such corporation is, or shortly will be, in a practical and a financial condition to serve all portions of the city. We do not apprehend that this is the condition of the Economic Gas

Company. It is a well known fact that Los Angeles is a city of more than one hundred square miles in territory. We assume that the gas company could not serve this territory now if it desired to gain such a tremendous advantage desired to to gain such a tremendous advantage in the future as the right to use any or all the streets as it saw fit, which would indeed be a gift of immense value, supporting no consideration and balanced by no obligation.

Harmonizing completely with the ideas just expressed is the opinion of Mr. Justice Holmes in the case of Wisconsin and Michigan Ry. Co. v. Powers, 191 U. S. 379, 385. In that case the state exempted railroads of the state north of the 44th degree of north latitude from paying taxes for the first ten years of operation. Subsequently a law was passed amending the former provision and taxing such railroads. This case is very similar to the case at bar and we quote and lay the greatest stress upon the words of the court touching this point. It was said that there could be no irrevocable contract, even where money was spent in reliance upon the statute. There was no mutual consideration for a contract because the promise of the state was not induced by the company's action, though the company's action may have been induced by the state's promise. Further:

> "It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in and action on the faith of a statute, merely because their interest was obvious and their action likely on the face of the law."

The words of the former constitutional provision were, as the California court has said in the case at bar, not specific with respect to persons or places. The offer was in general terms and not confined to a particular corporation, nor to a particular city. It was specific in only one thing, namely, the kind of privilege offered. The words were rhetorically loose, and the expression in intent permissive only. They were such as were described in St. Louis v. Western Union Tel. Co., 148 U. S. 92, (not the same citation as given above in the same case). This case discusses the act of congress of 1866, by virtue of which telegraph companies were permitted to use the military and post roads of the United States. The opinion of Mr. Justice Miller in Western Union Tel. Co. v. Mass., 125 U. S. 530, was quoted with approval and the declaration, in the case quoted, that the statute was merely a permissive statute, was emphasized. The statute, as it is known, was very similar in its expression to the former constitutional section of this state which we are discussing. The terms of section 19 of article XI, before amended, were nothing

but the expression of the pleasure of the people at the time merely, and thus fall within the doctrine enunciated in Stanislaus County v. San Joaquin Canal and Irrigation Co., 192 U. S. 201. In this case it developed that an act of the legislature of California in 1862 provided that water companies might collect rates for water, subject to regulation by the board of supervisors, but rates fixed by the board could not be depressed below a certain figure. Later, in 1885, the legislature passed another act providing for the fixing of rates lower than those formerly made. This case was taken to this court, which, upon a careful review of the case, decided that the language of the act would not be properly construed as a promise or pledge that the limitation as to rates might not be altered at any time when, in the judgment of the legislature, it might be proper to do so. The reasons were based upon changes of conditions necessarily brought about in the course of time in any given locality, *which reasoning is equally applicable to the case at bar*. The court said:

> "Water rates which might have been perfectly reasonable at the time of the passage of the act of 1862, although amounting to one and one-half per cent per month upon the capital actually invested, might in the course of years become exceedingly burdensome to those who used the water and amount to a very unreasonable compensation to the

company for the water it sold. Irrigation by means of corporations formed to supply water was in its infancy in 1862 in California, and the risks necessarily taken in the organization of such companies and the prosecution of their work were then not only very large but also extremely uncertain in character. Consequently, a rate of compensation was proper at that time which in the course of years and the accumulated experience as to the necessary cost of such works, and of their successful operation, including the consideration of the risk attendant upon their operation, would make a water rate, as provided by the act of 1862, a very unreasonable overcharge. *These facts must have been present in the minds of those who enacted the legislation of 1862, and it would be most unreasonable to suppose that it was intended by any such legislation to forever thereafter tie the hands of the state in regard to all companies organized under the act of 1862 and before the passage of the act of 1885.*" (Italics ours.)

May it not then be said that it is now unreasonable to believe that the people of the state of California, by their expression in the constitution of 1879, did not intend to tie forever the hands of the municipalities in reference to the control of their streets?

Again amplifying on the necessity of the person or corporation accepting the offer of a privilege before it becomes binding on both parties, we must incidentally refer to the doctrine laid down for charters and corporations. It has al-

ways been maintained that an act or charter of incorporation is nothing more than an offer to be consummated by acceptance.

Pearsall v. Great Northern Rwy. Co., 161 U. S. 646.

And until such acceptance, either by direct act or commencing business, the legislature can alter or repeal.

Capital City Light etc. Co. v. Tallahassee, 186 U. S. 401 (affirming 42 Fla. 462);

Cincinnati etc. Rwy. Co. v. Clifford, 113 Ind. 460;

State v. Balto. etc. Rwy. Co., 12 Gill and J., (Md.) 399;

Nashville etc. Turnpike Co. v. Davidson, 106 Tenn. 258.

It appears that this court has indicated a strong leaning toward a broad and liberal construction of the contract clause of the United States constitution and has not permitted it to be so construed that corporations might with impunity neglect to embrace the offers made by states and municipalities, and then later step into the courts and demand redress for the withdrawal of those offers. Mr. Justice Peckham, so lately deceased, passed upon this question with force and consistent expression in the case of Baltimore v. Baltimore Trust and Guarantee Company, 166

U. S. 673. In that case the Lake Roland R. R. Company had a franchise to construct and operate a passenger road in the city of Baltimore. This company succeeded to all the rights acquired by the North Avenue Railway Company. In 1890 the city of Baltimore was given power to regulate the use of its streets by railways. In 1891 the common council passed an ordinance by which they authorized the North Avenue Railway Company to lay down double tracks on Lexington street from North street to Charles street. This is a distance of about eleven hundred feet. In 1892 the Lake Roland Company commenced to lay its tracks in the city and the mayor of the city notified the company that the public interest required that only a single track should be laid on Lexington street and that the law officers of the city had informed him it was proper to prohibit the laying of double tracks. Subsequently an ordinance was passed prohibiting the laying of more than one track by the North Avenue Railway Company or any other corporation. This litigation followed, and Justice Peckham, in analyzing the case from the broad viewpoint of what was just and equitable as between the people and a private interest, in connection with any possible abridgement of the terms of a contract, said:

> "Upon the facts already set forth a sufficient foundation was laid for the exercise

of a fair and reasonable legislative discretion in determining the question whether the portion of the street mentioned should be occupied by a single or double track of the railway company. A regulation of that portion of the street by subjecting it to the use of but one instead of double railway tracks did not (in our judgment) thereby materially modify nor did it, in effect prohibit the exercise of the privileges previously granted by the city to the railroad company, nor did it impair the obligation of the contract or destroy vested rights, nor was this regulation substantially inconsistent with the terms of ordinance No. 23. While that ordinance provided generally for double tracks through the streets mentioned therein, the reduction of the right to use two tracks and the granting of the right to use but one for such a comparatively short distance in one particularly crowded and narrow thoroughfare was not a regulation inconsistent with the terms of the original ordinance. *It would, we think, be unreasonable to hold that the least limitation of the power to operate double tracks was an infringement and impairment of the contract as set forth in the ordinance.* In one opinion, the ordinance does not give any such cast iron right or one which shall be beyond any reasonable limitation and supervision by the city. It granted the use of the streets for double tracks for many miles, and the subsequent limitation of that use to one track related to but a few hundred feet where peculiar and exceptional conditions existed, where the danger to be apprehended from the use of electric cars on double tracks in a narrow and busy thoroughfare was very great, and where it might fairly be decided

by the common council that double tracks at that point would be an unreasonable and dangerous use of the street by the company and directly tend to prevent its reasonable and safe use and enjoyment by the public at large."

The views of this court as above set forth in the Baltimore case are very appropriately cited in a case such as the present one, for the court is bound, under the prevailing rules of legal construction, to lean strongly toward the contention of the public where there is interjected any doubt into the legal issues to be determined. And in the case at bar can it not be said that the public should be given the right to withdraw an unaccepted offer as to the streets of cities, when the companies to which the offer was made had not by user evidenced their intention to embrace the offer? It has been said that a franchise can be lost by non-user. Given v. Wright, 117 U. S. 648. It must then follow as a logical conclusion that, if the franchise may be lost by non-user, it cannot be acquired except by user.

III.

Statutory Grants are Strictly Construed.

Conveyances of rights in property, easements in public streets or places, or other grants in which the government has an interest must always be strictly construed in favor of the public

and nothing will pass except what is granted in clear and explicit terms.

Coosaw Mining Co. v. South Carolina, 144 U. S. 550;

Hughes v. The Northern Pac. Rwy. Co., 18 Fed. 106;

La Plaisance Bay Harbor Co. v. The Council of the City of Monroe, Walk Ch. (Mich.) 155.

Exclusive privileges, such as franchises for the occupation of streets, can be ascertained from legislative grants only by the rule of strict construction.

Scranton Elec. Light and Heating Co. v. Scranton Illuminating Light and Power Co., 3 Pa. Co. Ct. R. 628;

State v. St. Paul Rwy. Co., 108 N. W. 261, 98 Minn. 380.

Upon this well known principle of law there is some very strong language in a recent case decided by this court, namely: Detroit United Rwy. Co. v. Detroit, 229 U. S. 39.

In construing grants of special privileges by the state to individuals or corporations, nothing is to be taken as conveyed but what is given in unmistakable terms or by an implication equally

clear. Silence is negation, and doubt is fatal to the claim.

Clark v. Los Angeles, 160 Cal. 30, 39;
Charles River Bridge v. Warren Bridge, 11 Pet. 543, 547;
Helena Water Works Co. v. Helena, 195 U. S. 392;
Blair v. Chicago, 201 U. S. 400, 472;
Knoxville Water Co. v. Knoxville, 200 U. S. 33;
Pearsall v. Great Northern Rwy. Co., 161 U. S. 646, 664.

IV.

Governmental Functions Expressed in Offers of Franchises May be Changed or Enlarged Until a Definite Right Flowing From the Offer Has Become Permanently Acquired by User.

Aspinwall et al. v. Commissioners of the County of Daviess, 63 U. S. 364.

The charter of a railway created by the Indiana legislature in 1848, and supplemented in 1849, authorized the county commissioners of the county through which the proposed railroad was designed to pass, to subscribe for stock and issue bonds, provided that a majority of the qualified voters of the county ratified this proposal at an election. The electors duly passed upon the matter affirmatively and voted that a subscription

should be made. Before the subscription was made, however, the state adopted a constitution, one of the articles of which prohibited such subscriptions except under certain conditions. The argument advanced was that the provisions in the railway charter conferring power upon the board making it its duty to subscribe for stock, should the voters so determine, imported a contract with the railroad company on behalf of the state, which was protected by the contract clause of the Constitution of the United States.

The court said:

> "Without stopping to inquire whether or not the power conferred upon the board of commissioners in the charter and amendments of the railroad company, in the form and with the conditions therein mentioned, constitutes a contract, the court is of opinion that, in view of the body upon which the power is conferred, and of the nature of the power itself, no such contract existed, if any, as is contemplated by this clause of the Federal Constitution. The power or authority contained in the charter, and out of which the right in question is claimed to arise, is conferred upon the county, a public corporation or civil institution of government, and upon public officers employed in administering its laws; and the power or authority itself concerns this body in its public political capacity."

Let us then apply this reasoning to the case we are here discussing. Does not the regulation for damages to streets, as provided in the former

section of the California constitution, even where the right to use the streets and thus acquire franchises therein as used, was granted, amount to a power and authority similar to that mentioned in the above case? The power to regulate for damages and indemnity for damages was conferred upon the city by the constitution; and is not the city a "public corporation;" is not the power conferred upon "officers employed in administering its laws;" and does not the authority itself concern this body in its "public political capacity?"

In this case it was further said (page 377) that "Chief Justice Marshall observed, in Dartmouth College v. Woodward, (4 Wh. 627) that the word 'contract,' in its broadest sense, would comprehend the political relations between the government and its citizens; would extend to offices held within a state for state purposes, and to many of those laws concerning civil institutions, * * *. But, he observes, the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government," thus bearing out the theories which we have endeavored to exploit, namely, those based upon the right of a community to change its laws for the public good. And Mr. Justice Washington observed, in the same case (Dartsmouth College v. Woodward) at page 663:

> "In respect to public corporations, which exist only for public purposes, such as towns, cities, &c., the legislature may, under proper limitations, change, modify, enlarge, or restrain them; securing, however, the property for the use of those for whom, and at those expense, it was purchased."

This doctrine impresses us as distinctly applicable to the case we have before us. If this clause of the constitution did not contemplate the restraining of the states in the regulation of their civil institutions, then the regulation of the institution of the city of Los Angeles, by permitting it to regulate for damages to the streets, is not in the contemplation of the federal constitution, and the legislature, or the people through their constitution, may change, modify, enlarge or restrain such laws. In the case at bar it enlarged the institutions of the city by permitting the city to broadly regulate under its organic law and thus require written franchises that were not required before. The gas company, prior to the constitutional amendment, was authorized to use the streets subject to certain regulations, namely, under the direction of the superintendent of streets, and such regulations as the municipality might prescribe for damages, etc. In the Aspinwall case the charter of the railroad provided that it should be lawful for the county commissioners to subscribe for stock on behalf of the county, if

the voters sanctioned it. This the voters did at the election of March, 1849. On the 10th of September, 1852, the board subscribed for stock. The state of Indiana had a new constitution, adopted November 1, 1851, prohibiting the county from subscribing for any stock except in certain cases, etc. *It was contended that the right to the subscription to the bonds rested upon a contract in the charter and was unaffected by any subsequent statute or by the organic law of the state.* This is, therefore, very similar to the case at bar. The claim is that the right to use the streets rests upon the contract in the former constitutional provision, unaffected by any change to the organic law of the state. The court held in the Aspinwall case that such was not the law. It decreed that something more was needed to make a contract between the county and the railroad than the insertion of the clause in the charter and the sanction of a majority of the voters, namely: That it took an actual subscription to make a contract.

Note what the court has said:

> "The election took place on the first Monday of March, 1849, when a majority of the votes was cast for the subscription. The constitution of Indiana took effect 1st November, 1851. But the subscription was not made till the 10th September, 1852, and the bonds were issued after this date. It is insisted that the contract of subscription became complete when, at the election, a ma-

> jority of the votes was cast in its favor, and did not require the form of a subscription on the books for the stock of the railroad company to make it obligatory upon the parties; and which, if true, it is agreed the contract would be protected within the constitution of the United States, as it would then have been complete before the constitutional prohibition of Indiana. But the court is unable to concur in this view. *It holds that a subscription was necessary to create a contract binding upon the county, on one side, to take the stock and pay in the bonds; and upon the other, to transfer the stock, and receive the bonds for the same. Until the subscription is made, the contract is unexecuted, and obligatory upon neither party.*" (Italics ours.)

Certainly the Aspinwall case has features similar to the present case and the logic of its decision should decide the case at bar. The insertion in the original constitutional provision of this state of a right to use the streets did not create a contract. It took something more, namely, the use of the streets, and until such streets were used, it could not be said it was a contract within section 10, of article I, of the Federal Constitution, for, to quote the Dartmouth case, "the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government." The actual subscription to the bonds in the Aspinwall case was necessary to make a contract because, until such

time, the contract was unexecuted and no consideration had passed, and therefore was obligatory upon neither party. That is the case here. Until the contract is executed, by the use of the naked right offered to use the streets, it could be obligatory upon neither party.

To the same effect see:

Wadsworth v. Supervisors, 102 U. S. 534.

The general doctrine has been laid down as follows:

> "The legislature may repeal laws authorizing municipal subscriptions to railroads, even where such laws were in existence at the time the railroads were chartered, and even though stockholders may have been influenced by such subscriptions."

Pearsall v. Great Northern Rwy. Co., 161 U. S. 646;

Norton v. Brownsville, 129 U. S. 479;

Concord v. Portsmouth Bank, 92 U. S. 625;

Falconer v. Buffalo R. R. Co., 69 N. Y. 491;

Covington and Lexington Co. v. The Kinton County Court, 12 B. Mon. 144;

Wilson v. Polk County, 112 Mo. 126.

V.

Until There was an Actual Physical Occupancy of the Streets, Under the Former Section 19 of Article XI, There Could be No Franchise. It was a Mere Offer.

The right to use the streets granted by the former provisions of section 19 of article XI is materially different from an actual use. The terms of this much mooted provision were vague and indefinite. They applied to all in a class and were without such specification of detail as to give any definite property rights. One cannot, under the law of contracts, hold another upon a contractual obligation arising out of the publication of a reward until he has acted upon the offer contained in the publication, and produced the results for which the reward is offered. The terms of section 19 were as barren of the definite attributes of a binding contract as is the unaccepted offer of a reward, and such terms could not be embraced in any manner demonstrating the mental conjunction of the parties upon the terms, except by user. There is an important line of cases treating of the distinction between franchises and licenses, and clearly setting forth the necessity of a definite acceptance of the offer of street rights to work an irrevocable franchise. In the well known and frequently cited case of The City of Belleville v. The Citizens' Horse Rwy. Co., 152 Ill. 171, 184, it was said:

"Counsel for appellee also confounds, in his printed brief, licenses and contract rights with franchises, and the result is, that he arrives at what we deem a wrong conclusion in respect to the present controversy. The contentions of appellee in this behalf are, that it derived from the ordinance of the city its franchises, or part of its franchises; that the city had no judicial authority to declare and enforce a forfeiture of its franchises; that a court of chancery had no jurisdiction so to do, and that a cause of forfeiture of a franchise cannot be taken advantage of or enforced against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose, at law, by *quo warranto* against the corporation.

"Blackstone says (book 2, chap. 3, 37,) that a franchise is a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject; that being derived from the crown it must arise from the king's grant, or held by prescription, which presupposes a grant. In Chicago City Railway Co. v. People *ex rel.*, 73 Ill 541, this court said that corporate franchises in the American states emanate from the government or the sovereign power, owe their existence to a grant, or, as at common law, to prescription, which presupposes a grant, and are invested in individuals or a body politic.

"The proposition which is the foundation of appellee's claim was expressly decided, and decided adversely to such claim, in the case last cited. It was there held that where a street railway company is incorporated under an act of the legislature, with power to construct, maintain and operate a railroad in a city, upon the consent of the city, and in

such manner and upon such conditions as the city may impose, and the city, by ordinance, grants the privilege of constructing and operating the same upon a certain street, the grant by the city is a mere license, and not a franchise. To the same effect are the subsequent cases of Board of Trade v. People *ex rel.* 91 Ill. 80, Chicago and Western Indiana Railroad Co. v. Dunbar, 95 *id.* 571, City of Quincy v. Bull, 106 *id.* 337, and Chicago Municipal Gas Light Co. v. Town of Lake, 130 *id.* 42. And in this latter case it was also held, that the privilege of the use of the streets of a city or town, when granted by ordinance, is not always a mere license, and revocable at pleasure; *that if the grant is for an adequate consideration, and is accepted by the grantee, then the ordinance ceases to be a mere license and becomes a valid and binding contract, and that the same result is reached where, prior to its revocation, the license is acted upon in some substantial manner, so that to revoke it would be inequitable and unjust.*" (Italics ours.)

A well known text-book writer has said:

"The right granted by a municipality to use its streets in such cases is frequently called a franchise, but it is a franchise in the secondary rather than in the primary sense of the term. It is more in the nature of a license, which may be revoked at any time before its acceptance, and which vests no right in the licensee until it is accepted and used."

We are indebted for the foregoing expression to

Elliott on Railroads, Section 1079, in Vol. 3.

It is true that in most cases sustaining this contention the privilege was required to be used within a certain definite time, but the force of the court's reasoning is the same. It was said in The Atchison Street Railway Co. v. Nave *et al.*, 38 Kans. 744, 752:

> "The contention that the privilege granted by the ordinances remains until a forfeiture is declared, is not sound. The permission conferred by the city council was for a limited time, and when that time expired the privilege no longer existed. The grant is not an irrevocable one, which continues indefinitely, to be accepted or rejected at the option of the company. *The consent of the city council to occupy the street is a mere license, and until the company has availed itself of the license no contractual obligation or relation arises which requires a judicial declaration of forfeiture.* Until the license is accepted and used, no right vests in the railway company, and it may be revoked by the city council; and after the time within which it may be availed of expires, the license lapses and no revocation is needed to terminate the same. The railway company or licensee cannot thereafter occupy the street or build its road thereon without a new permission from the city authorities." (Italics ours.)

In the above case the court's reasoning dictates the same rule in the case at bar. If the consent of the authorities is a mere license in one case, the consent of the sovereignty in the other case is a mere license. The only distinction between the consent expressed in an ordinance with a six months' limitation, as in the case of the Atchison Street Railway Co. v. Nave, *supra*, and a consent expressed in the constitution is, that one expires in six months by limitation and the other expires when withdrawn.

Where a municipal corporation has granted to a street railway company a right to lay its tracks, but required it to have its railway in operation within a certain time, such grant is a mere license to lay, maintain and operate such railway upon the conditions named in the ordinance and should be construed most strongly against the grantee.

1 Nellis on Street Railways, Section 50;
Blocki v. People, 220 Ill. 444.

Before abandoning this discussion of physical occupancy being necessary to consummate a franchise, we submit the case of Indianapolis Cable Street Railway Co. v. The Citizens' Street Railway Co., 24 N. E. 1054. In this case the common council of the city of Indianapolis granted a franchise to the Citizens' Company to operate street railways on all of the streets of the city. Later it granted to the Cable

Railway Company the right to construct and operate cable lines on all of the streets of the city. The Cable Company had a surveyor working for a cable construction company laying out a line, then gave up the idea of a cable line and laid tracks for an electric line. The Citizens' Company removed a portion of the track, at a place which had been surveyed for a cable line, and installed its own line. The court held that "the first to actually occupy the street had the better right," and gave its decision in favor of the Citizens' Company. It was tantamount to holding the survey of the cable line not to be such an occupation as to vest "the inchoate right conferred by a general grant," and, as it did not actually occupy the streets with a cable line, and the Citizens' Company did instal a railroad of the variety it was authorized to operate, *the Citizens' Company had first occupied the streets in question so as to cause the vesting of its inchoate right.* To recapitulate, the Cable Company had undoubtedly at one time intended to operate its cable line on certain streets; it had even gone so far as to have a survey made. Yet with a full knowledge of these conditions the court held that *the inchoate right conferred by the general grant did not vest by this, and would only vest when actual construction of the cable line should be begun, "and the work, with a view to its completion, should be diligently prosecuted."*

VI.

No Perpetual Rights Vested in the Economic Gas Company.

This is another phase of the controversy which we cannot overlook. We have discussed fully the question whether the Economic Gas Company acquired any rights as to streets not occupied before the right was withdrawn by the amendment to the constitution. There are certain well known principles governing rights in perpetuity and these are considered in a variety of cases which we now purpose to discuss briefly. To make plain the applicability of the doctrine of perpetual rights to the propositions advanced in the case at bar, we submit the following. These propositions are self-evident. If the Economic Gas Company acquired rights in the streets of Los Angeles as to streets not occupied, as well as to streets occupied, they then must be perpetual rights. It has been said there can be no middle ground. They must exist always, no limit of time being set short of infinity. If the Economic Gas Company can continue occupying the streets without restraint, it can ultimately use every available street area in the city. Such an exigency, it would seem, should not be contemplated in the law. It would seem intolerable and not in harmony with the trend of judicial opinion in this country to-day. The courts have on many occasions indicated

their intolerance of assertions of perpetual rights and there are many cases evidencing a strong judicial antipathy toward these and kindred assertions of special privilege. In all of the cases we are here subjoining this judicial aversion is strongly indicated.

St. Louis v. Western Union Tel. Co., 149 U. S. 465, 37 L. Ed. 810;

Wabash R. R. Co. v. City of Defiance, 167 U. S. 88, 42 L. Ed. 87;

Hodges v. Western Union Tel. Co., 72 Miss. 910, 29 L. R. A. 770;

St. Clair Co. Turnpike Co. v. Ill., 6 Otto 63, 24 L. Ed. 651;

Omaha Electric Light & Power Co. v. City of Omaha, 179 Fed. 455;

Wyandotte Electric Light Co. v. City of Wyandotte, 124 Mich. 43, 82 N. W. 821;

Virginia Canon Toll Road Co. v. People, 22 Colo. 429, 45 Pac. 398;

City of Rock Island v. Central Union Tel. Co., 132 Ill. App. 248;

East Tennessee Tel. Co. v. Frankfort, 133 S. W. 565.

In the case of St. Clair County Turnpike Co. v. People of Illinois, heretofore cited, the court considered a grant by the Illinois legislature which had been made without limitation as to

time. It applied the rule of strict construction and denied the contention made by the company that it was a right in perpetuity. The court said:

> "No term was expressed for the enjoyment of this privilege; and no conditions were imposed for resuming or revoking it on the part of the state. It cannot be presumed that it was intended to be a perpetual grant; for the company itself had but a limited period of existence. At common law, a grant to a natural person, without words of inheritance, creates only an estate for the life of the grantee; for he can hold the property no longer than he himself exists. By analogy to this, a grant to a corporation aggregate, limited as to the duration of its existence, without words of perpetuity being annexed to the grant, would only create an estate for the life of the corporation. * * * Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public."

There is a similar position taken by the Circuit Court of Appeals of the Eighth Circuit, in Omaha Light and Power Co. v. Omaha, heretofore cited. In this case it was laid down that the case would necessarily be decided upon the fundamental question of whether the city had the power to grant a perpetual franchise, and if so, whether it had in fact made such a grant. The court's first conclusion was that the city had no such power, but it added that it could not have been said that there was an implied grant of a perpetual right.

The case of Hodges, Collector for the City of Meridian, v. Western Union Tel. Co., 72 Miss. 910, treats of a statute of that state providing that any telegraph company might, upon making compensation therefor, have the right to construct, maintain and operate lines on and across all streets. There was no compensation provided for cities in case the streets should be used, but the use of the streets was expressly authorized without compensation. The city of Meridian undertook to collect, by ordinance, a municipal tax for the use of the streets and the case reached the Supreme Court of the state of Mississippi which passed upon this point. While the judgment of the state court was that the municipal ordinance was void, the grounds were that the state had a right to tax and not the city, but it was expressly held that the state could have done what the city did do. The difference between that case and the case at bar is that the city had no express authority, while in the case at bar it has express and unlimited authority.

The expression of Mr. Justice Whitfield upon the character of a privilege of this kind is worthy of notice here. In going into this matter he said:

> "It is manifest that if the state, having 'supreme and transcendent' power over the streets of Meridian, grant the appellee the right to so use and occupy the streets without compensation to the state or the city,

then the city of Meridian, a political municipal subdivision of the state, cannot, by ordinance, affect the license thus granted. *It is revocable at the pleasure of the state, but not of the city, unless granted such power by the state, so far as affects it.*

"It is to be noted that this is not a tax. The license is a mere permission to enter the streets of the city, and so use and occupy them, without paying the damages usually assessed in part, where the right of eminent domain is used for condemning rights of way in streets, etc. It is a permissive statute. What it gives is a mere license, revocable by the state."

In the case at bar the only difference between the status of the Economic Gas Company before and after the constitutional amendment is that before the constitutional amendment it had permission to use such streets as it desired without being required to take any formal proceedings to excavate; while under the amendment, it is necessary to pursue certain formalities first. The city of Los Angeles having charter authority and the city officials having authority by ordinance, it is to be presumed that franchises for the use of the streets may be obtained in the ordinary way by advertisement and bid, and will continue indefinitely to be obtained in the same manner. The additional formalities necessary now are nothing more than an increased burden on the Economic Gas Company if it desires to continue extending its mains. This seems to place the case

in a somewhat similar posture to the notable decision in Wabash R. R. Co. v. Defiance, 167 U. S. 88. The city of Defiance, Ohio, passed an ordinance permitting the Wabash, St. Louis and Pacific Ry. Co. to erect new bridges over and across the tracks of the railway of said company where the same crossed the public streets in the Third Ward of said city. The ordinance fixed the width of the road-way of said bridges at eighteen feet and the distance between the top of the rails and the bridges at twenty-one feet. Approximately six years later, the city changed the grade of the street upon which said bridges were built, causing the bridges to be useless. The railroad company averred that the sole purpose of the ordinance was to cause the overhead bridges and approaches thereto to be destroyed and removed, and that if the city were allowed to carry out its purpose such crossings would be extremely dangerous to persons having occasion to use the same. The railroad asked for an injunction and the case ultimately reached this court. It will be recalled, and here must be emphasized, that the ordinance authorized the railroad to erect bridges over its tracks. This would prevent vehicle and pedestrian traffic from interfering with the passage of trains. The similarity between that case and the case at bar must now be borne in mind when we present the following expression of Mr.

Justice Brown of this court in deciding that case. He said:

> "We have found some difficulty in evolving any contract at all from the ordinance of December 20, 1897, which, on its face, is a *permission or authority* to construct these bridges under certain requirements and specifications, and to keep them in repair. * * *
>
> "The language of this ordinance is rather that of a license than that of a contract; the railroad is authorized to erect new bridges of a certain construction, provided that the company shall also build sufficient approaches and grades to each of said bridges and keep them in repair. The city itself agrees to do nothing except to permit gravel to be taken from its gravel bed, without charge, for the construction of such approaches. *It does not agree that the bridges or their approaches shall remain any particular length of time, or that it shall not make new requirements as the growth of the city may seem to suggest.* The only contract as to time which could possibly be extracted from this ordinance would be that the railway company, in building the bridges and approaches, should be entitled to maintain them in perpetuity. The result would be that, if the city should, in the growth of its population, become thickly settled in the neighborhood of these bridges, they would stand forever in the way of any improvement in the streets. The proposition is clearly untenable. It is incredible, in view of the language of this ordinance, that the city could have intended, or the railroad company have expected, that the former thereby relinquished forever the right to improve or

change the grade of these streets" (Italics ours.)

It will thus be noted that the attitude of this court is strongly against perpetual rights, particularly where the statute or the constitution, as the case may be, is silent thereon.

We are also adding the language of the opinion in the case of East Tennessee Tel. Co. v. Frankfort, 133 S. W. 565, in passing upon the claim of a telephone company of a right in perpetuity to use the city streets. It was said:

"It is insisted for the telephone company that the rights given by the resolution, after being accepted and acted upon, cannot be impaired by any subsequent action of the council, and that the franchise or privilege, being without limitation as to time, is perpetual. But it will be observed that the resolution of April 11, 1881, does not purport to grant a franchise. It only grants permission to the telephone company to use the streets. A permission is no more than a license, and as a rule a license may be withdrawn by the party who grants it. Taking the resolution of April 11, 1881, as a whole, we are satisfied it was not intended as a grant of a franchise, but only as a grant of a license; for no rights are given the telephone company except a bare permission to do certain things. He who takes under a license, although he may spend money upon it, makes the investment with the knowledge that the license may be withdrawn by the grantor. The resolution of a municipal council will not be etxended beyond the fair

> meaning of the words used, and so made to include things to the detriment of the public not fairly within the language used. But, while the council may revoke its permission, it can only do so where, as here, extensive improvements have been made upon the faith of it, upon reasonable notice, giving the grantee a reasonable opportunity to remove his property from the premises, or to acquire a new franchise."

The Supreme Court of Michigan also expressed itself along these lines in the case of Wyandotte Electric Light Co. v. City of Wyandotte, 124 Mich. 43, where it said:

> "If a railroad company were organized for a period of thirty years, and a party, natural or corporate, should grant it a right of way without specifying the time of user, the grant would be for the lifetime of the corporation. The law would imply that both parties contracted with reference to its period of existence. The same rule is applicable here."

VII.

The Points and Authorities of Plaintiff in Error Considered and Distinguished.

Plaintiff in error has embraced in a supplement to his brief in this case (page 64), a copy of section 629 of the Civil Code, creating a liability upon gas companies for not furnishing gas upon application. The position which plaintiff in error has taken is that if the city cuts off the right of the Economic Gas Company to use the

streets for its mains, it subjects such company to the liability created by law upon any corporation furnishing gas if such corporation does not furnish the same upon application in writing from the owner or occupant of any building distant not more than one hundred feet from any main. This provision obviously does not apply to extensions, but simply to service connections. The petition of plaintiff in error while in the California court fairly indicated that the excavation made by plaintiff in error was for the purpose of extending the mains of the company along new streets and not for the purpose of making service connections. Anyway, it may be said, if the company has not and cannot secure competent authority to make the necessary connections to comply with section 629 of the Civil Code, it certainly could not be contended that it would be subjected to a penalty for failing to do that which it could not do, and was unlawful for it to do. The argument of plaintiff in error in support of the contention that the gas company would be exposed to the liability imposed by section 629 of the Civil Code in case he refused to make extensions, is premised upon the assumption that the municipality of Los Angeles will be exercising its control over franchises.

Section 6 of article XI of the California constitution reads as follows:

> "Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, except in municipal affairs, shall be subject to and controlled by general laws." (The words 'except in municipal affairs' inserted by amendment adopted November 3, 1896.)

It will be seen from the terms of the above provision that municipal charters prevail over state laws in municipal affairs, and thus the charter of the city of Los Angeles requiring franchises would prevail over the state law creating the penalty for a lack of service, the franchise provision of the charter being a municipal affair.

> Sunset Tel. & Tel. Co. v. Pasadena, 161 Cal. 265.

We have no argument to make against the principles enunciated by plaintiff in error on pages 15, 16 and 17 of his brief, as to the quali-

ties of the early constitutional provisions. That the provisions of the California constitution were mandatory and prohibitory and required no legislation to effect their purposes, is true. But they were not mandatory, neither were they prohibitory, upon points they did not cover. The terms of section 19 of article XI. as it was formerly written, provided that any individual or company should have the privilege of using the streets. That was proper, but when they did not use the streets, the privilege was lost when withdrawn.

The case of the People v. Stephen, 62 Cal. 209, received very lengthy consideration by plaintiff in error, he having devoted six or seven pages to an explanation of it, and on page 21 he gives a lengthy excerpt from the opinion, quoting debates of the constitutional convention at which the provision was inserted. But it does not take even a careful consideration to discern that the tenor of the decision was simply that no legislation was needed to put in effect the provisions of the constitutional section as it was formerly written. The case is barren of any holding which will affect the decision in the case at bar.

Again, we will consider the citation on page 24 of the brief of plaintiff in error of Pereria v. Wallace, 129 Cal. 397. This case was lengthily reviewed by plaintiff in error, but the effect of the decision was only that no statute could abridge

in any degree the right to use the streets under the old provision. It is elementary that a statute is subservient in its operation to a constitutional provision, and we do not see that any light is obtained from a consideration of this case.

This is also true of

Ex parte Johnston, 137 Cal. 115.

We are surprised to note the emphasis which plaintiff in error has laid upon the case of Stockton Gas and Electric Co. v. San Joaquin Co., 148 Cal. 313, for it would impress us that this case is strongly in favor of the position taken by defendant in error. Plaintiff in error said, on page 27 of his brief, that when the franchise right was used it became vested. We emphasize that where a franchise right is not used it does not become vested. As the court said, "It has a local situation in the place, and that place only, where the right is actually exercised." We set forth with italics certain portions of the same opinion which we consider greatly favor our position:

> "From these authorities it would appear, then, that the franchise extended by the constitution is of such a character that *it is indissolubly annexed to the street of a city in and upon which it is exercised, and that, while an incorporeal hereditament, it is, in contemplation of law, real property, an easement appurtenant to such streets.*" (Italics ours.)

Again, it is said:

> "This right of way, an easement, is real property, and is distinctly and necessarily local in character, and situated in and upon land. It is clear, too, that the right to use the pipes, conduits, and poles for the transmission of illuminants to the city and its inhabitants *is a right which is exercised and can be exercised only in connection with and at the situs of the right of way and location of the appliances.*" (Italics ours.)

This is an exceedingly reasonable view in the court's opinion. That the franchise was not acquired in the streets unoccupied can be reasonably deducted therefrom. How can any other attitude of the court be reconciled with the words of many parts of this opinion? This was a case that had to do with the taxation of a franchise. A franchise should be taxed on a basis of value. Does any one suppose, and can it be argued with any degree of conviction, that the gas corporation would have voluntarily accepted taxation on the basis of a definite income from every street in the city? The California court held that the rights acquired under the constitutional provision amounted to a franchise, but they did not hold that such franchise extended to streets not used. This is very plainly seen from the attitude of the Supreme Court in the case of Western Union Tel. Co. v. Hopkins, 160 Cal. 111, 122.

We see nothing in the excerpt from the opin-

ion set forth by plaintiff in error from the case of Stanislaus County v. San Joaquin Canal and Irrigation Co., 192 U. S. 201, which is appropriate to the contention of our adversary.

On page 29 of his brief plaintiff in error cites three cases to sustain the principle that any right conferred by the constitution which extends generally to all persons or corporations, does, when accepted by any particular person or corporation, become a special franchise. Consideration of the cases which he cites does not develope that they are properly cited to this principle, and the second case, namely, Sunset Tel. & Tel. Co. v. Pomona, 172 Fed. 829, was reversed in Pomona v. Sunset Tel. & Tel. Co., 224 U. S. 330.

We do not take issue with the position of the California court taken in the case of Bank of California v. San Francisco, 142 Cal. 276, but the case does not apply to the point we are discussing.

The case of Hovelman v. Kansas City R. R. Co., 79 Mo. 632, is not appropriately cited, as it is a specific grant to a specific corporation.

This is likewise true of State v. Jersey City, 8 Atl. 123, and Des Moines Street R. R. Co. v. Des Moines Broad Gauge R. R. Co., 33 N. W. 610.

In the following cases an examination of their text shows that they all pertain to specific grants

of authority to specific corporations or individuals. As carefully explained in this case when considered by the California Supreme Court, they do not cover the premises.

Board of Morristown v. East Tennessee Tel. Co., 115 Fed. 304 (page 32 of brief of plaintiff in error);

Commonwealth v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339 (page 35 of brief of plaintiff in error);

People *ex rel.* Woodhaven Gas Co. v. Deehan, 153 N. Y. 528 (page 41, brief of plaintiff in error);

San Antonio Traction Co. v. Altgelt, 200 U. S. 304 (page 41, brief of plaintiff in error).

In the consideration of the last enumerated case it would appear that the case somewhat favors the contention of defendant in error. We take the following from page 308:

> "We have repeatedly held that where a railroad was originally chartered before a new constitution took effect, if such road is subsequently consolidated with other roads, or accepts new privileges after a new constitution takes effect, all contracts, privileges and franchises conferred after the adoption of such constitution are subject to its provisions. Shields v. Ohio, 95 U. S. 319; R. R. Co. v. Maine, 96 U. S. 499; R. R. Co. v. Georgia, 98 U. S. 359; Keokuk etc. R. R.

Co. v. Missouri, 152 U. S. 301; Yazoo etc. R. R. Co. v. Adams, 180 U. S. 1 and 23."

There is reason to hold that this case, therefore, sustains our case at bar.

In the San Antonio case it appears that the road was chartered before a constitution of the state of Texas became effective in 1876. Twenty-three years later an ordinance was passed granting an extension of time to the San Antonio Street Railway and the San Antonio Edison Company, and imposing certain limitations upon the exercise of their franchises, among which was a regulation of fares. Later all the property was sold to a trustee for the stockholders. Various other changes occurred and the court held, as we have indicated, that the railroad was subject to the provisions of the new constitution. In a sense the Economic Gas Company is in the same posture. It is seeking new privileges—that is, it is seeking to use new streets, and should be subject to new conditions. The argument of this court in the case we have cited is such as to clearly indicate its reluctance to hold that corporations shall not be subject to a state's organic law.

The following cases cited by plaintiff in error on pages 41 and 42 of his brief, all deal with specific grants to specific individuals or corporations and would not seem, therefore, to be prop-

erly cited as supporting the contention that plaintiff in error here has made:

City of Burlington v. Burlington Street R. R. Co., 49 Iowa 144;

Nash v. Lowry, 33 N. W. 787;

Citizens Street Rwy. Co. v. City Rwy. Co., 56 Fed 746, 64 Fed. 647;

Mercantile Trust Co. v. Denver, 161 Fed. 769.

In fact, in the recent case of the Grand Trunk Western R. R. Co. v. South Bend, 227 U. S. on page 557, it will be seen that this court distinguishes strongly between general grants and special grants.

Even in the case of Baltimore v. Baltimore Trust and Guarantee Co., 166 U. S. 673, this court held in the case of a special grant that it could be changed by later law where it applied to all the streets of a city. That case was distinguished upon that ground in the Grand Trunk case.

We find no other cases in the brief of plaintiff in error which we deem of sufficient importance to explain or distinguish.

Conclusion.

We respectfully submit to this Honorable Court that plaintiff in error has presented no argument which would justify the reversal of the decision of the California Supreme Court in this case. It appears to us that in view of the general character of the privilege extended in section 19 of article XI of the California constitution, as it was first enacted, it cannot be said that any right could be acquired which could not later be withdrawn. It is not contended by defendant in error that the change in the constitution can disturb the Economic Gas Company's rights in the streets used previous to the amendment. We confidently maintain that the authorities we have cited sustain the position of defendant in error.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 415.

ROBERT RUSSELL, PLAINTIFF IN ERROR,

vs.

CHARLES E. SEBASTIAN, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF IN BEHALF OF DEFENDANT IN ERROR.

RAY E. NIMMO,
ALBERT LEE STEPHENS,
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SUPPLEMENTAL BRIEF IN BEHALF OF DEFENDANT IN ERROR.

Introductory Statement.

During argument in the above-entitled cause before this court on Tuesday, January 6, 1914, counsel for plaintiff in error raised questions which had not been previously introduced into the controversy and, upon request, the court gave permission to counsel for defendant in error to file a supplemental memorandum which is herewith submitted.

Brief.

It was intimated by counsel for plaintiff in error that, in view of the right of the Railroad Commission of the State of California to require extensions of the mains of water and gas companies operating in that State, and in view of the prohibition said to be created by the amendment to section 19 of article XI of the Constitution against companies extending their mains unless by the authority of the city under its organic law, the companies were sadly harassed and the State Supreme Court had found itself in a dilemma from which it would be gladly relieved by a decision of this court. It was also intimated that another decision of the Supreme Court of California was probably being delayed for the purpose of noting the decision in the case at bar by this court. We believe the fallacy of this position is patent, and needs little argument to be disposed of as a question deserving no consideration.

In the first place, the right of the Railroad Commission to require extensions is in no place raised either in the issues of this case or by the briefs, and should not, in our opinion, be considered in deciding the case.

Secondly, the argument applies with no more force to the Economic Gas Company than to any company in the State incorporated after the constitutional amendment of 1911. *It could hardly be argued that the obligation of the contract of a company incorporated for supplying gas later than October* 10, 1911, *was impaired. In such case the company could be said to have had no contract, as it was not in existence as a corporation on October* 10, 1911. *But would not such company be in as sad straits as the Economic Gas Company? It could not be urged that a company incorporated after October* 10, 1911, *could excavate in the streets of Los Angeles without the authority of a franchise; yet the Rail-*

road Commission, or the city, could require extensions of the mains. The reversal of the judgment of the Supreme Court of California in this case would certainly not relieve that court of its so-called dilemma with respect to those companies incorporated later than October 10, 1911. *Therefore we consider that this issue raised by plaintiff in error is immaterial, and not in any sense pertinent to the issues involved, and cannot assist this court in reaching a decision upon the merits of the case.*

We urge with the greatest force we can employ that the decisions of this court are never based on expediency, nor are they to be sought to relieve a State court of what is argued to be an incongruity between its decisions and those of other tribunals or quasi-judicial bodies in the same State. The decisions of this court are based on law and in the case at bar the adjudication can only be properly made upon such basic argument and precedent as were submitted in the original briefs of this case.

Reference is made to the decision of the case of August Lukrawka *et al. vs.* Spring Valley Water Company by the District Court of Appeal for the first appellate District of California. The facts in this case were briefly these. A writ of mandamus was sought to compel the defendant company to extend its water mains in the city of San Francisco. It was shown that the company would be obliged to occupy streets not previously occupied by it. The court held that a demurrer to the petition and complaint should be sustained upon the ground that the company could not extend its mains in streets not occupied by it prior to the constitutional amendment. We submit that this decision was undoubtedly correct and in harmony with our statement (pages 62 and 63 of our original brief) in connection with the argument that section No. 629 of the Civil Code of California created a liability as to gas companies. On page 63 we said that if the company has not, and cannot, secure competent authority to make necessary connections to comply with the terms of this

section of the act, it certainly could not be subjected to a penalty for not doing so. This applies with equal appropriateness to an order of the Railroad Commission or of the city. The order of the Railroad Commission in the decision cited is correct. (E. T. Dooley *et al. vs.* People's Water Company, Case No. 442, Decisions California Railroad Commission.) The order of the Commission reads as follows:

> "It is hereby ordered that People's Water Company be and the same is hereby directed, *as soon as the city authorities of Berkeley will permit the use of the extension of Keith avenue* for the purpose of installing a water main thereon, to extend, with reasonable diligence, a water main having a diameter of at least two (2) inches, from the end of the present water main in Keith avenue, to serve the premises of Dooley, Grebs, Britton, and Manchester, in said Hopkins Terrace No. 4, and thereafter to serve them with water at the regular rates without additional expense. The cost of such extension will be a proper capital expenditure and should be considered by the appropriate public authority in establishing the rates to be charged by defendant for water supplied in the city of Berkeley."

We have also demonstrated (page 64 of our brief) why the charter of Los Angeles prevails over the general law of the State. This applies to the Railroad Commission and its orders.

In brief our contention is that the company cannot be compelled to extend its mains, by order of the Railroad Commission, without a franchise—this applies to both companies incorporated before and after the change in the constitution—but the Commission, or city, may order that the company extend its mains when it has a franchise or authority, and perhaps may require the company to apply for a franchise, though with this last we are not concerned. It is too well settled to need citation that the Commission could not require a company to extend its mains if the extensions would cost

so much and yield such slight revenue that the compelled extension would amount to confiscation of the company's capital and property. In such a case there would be no obligation to extend the mains. This idea is clearly entertained by the Commission as it will be seen by the following extract from the opinion of the Commission in the case cited. The Commission said on page 10 of its decision:

> "It may be that cases will occur in which it would not be fair either to the water utility or to its existing consumers to apply this rule strictly. For instance, a proposed customer may live so far from the existing main or his land may be so difficult of access or it may be necessary to install such additional machinery to pump water to his property that the detriment to the utility itself and to its existing customers resulting from the large expenditure necessary to be made would be such as to outweigh the advantage to the individual customer and such as to make it fair to ask that the customer should himself pay for all or a part of the necessary extension or increase in machinery. In other words, it may well be that the foregoing rule should not be rigidly applied in a case in which a considerable burden would be cast upon the remaining consumers in order to serve one or more intending consumers. While there may be difficulties in the application of this general rule, I am of the opinion that the rule is correct as a general principle and that it should be applied in all cases in which an exception is not clearly established. If the water utility in reaching its conclusion as to whether or not the rule should be applied in a particular case, reaches a decision which does not seem equitable to the intending customer, there should be some public authority with the right to pass on the question and to say whether or not the course which the utility desires to adopt is a proper one. As I shall now show, the power to take such action has been vested by the people of this State in the Railroad Commission, except in those few cases in which the Legislature of this State has granted such power to incorporated cities and towns under their freeholders' charters."

In conclusion we again urge with the most emphasis we can bring to bear that the right of the Railroad Commission to compel extensions has nothing to do with this case. In the city of Los Angeles most of the functions of the Railroad Commission are vested in a Board of Public Utilities, a local charter body. The power to compel extensions is a power of government, a sort of police power to protect public health and insure public safety and welfare, and has nothing to do with the law of contract.

We have urged in our first brief that there was no consideration flowing to the city and its inhabitants from the gas company as to unoccupied streets. There was no contract and there is no contract now; the consideration did not pass as to those streets.

The judgment of the Supreme Court of California should be affirmed.

Respectfully submitted,

RAY E. NIMMO,
ALBERT LEE STEPHENS,
Attorneys for Defendant in Error.

RUSSELL *v.* SEBASTIAN.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 415. Argued January 6, 1914.—Decided April 6, 1914.

In determining the question of impairment under the contract clause of the Constitution it is the duty of this court to determine for itself the nature and extent of rights acquired under prior legislative or constitutional action.

The state court having construed a statutory or constitutional provi-

sion, which gave specified privileges in regard to public utilities in a certain class of municipalities under specified conditions without specifying the persons or corporations who could avail thereof or the method of acceptance, to the effect that the grant became effective in any municipality within the designated class by the party accepting it as if it had been made specially to the accepting party, this court follows such construction in regard to § 19 of art. XI of the constitution of 1879 of California as amended in 1884.

When the State declares that it is bound if its offer to grant a privilege, which plainly contemplates the establishment of a plant and the assumption of a duty to perform the services incident to a public utility, is accepted, the grant resulting from the acceptance constitutes a contract and vests a property right in the accepting party which is within the protection of the contract clause of the Federal Constitution.

The rule that public grants are to be construed strictly in favor of the public, and ambiguities are to be resolved against the grantee, is a salutary one to frustrate efforts through skilful wording of the grant by interested parties; but the rule does not deny to public offers a fair and reasonable interpretation or justify withholding that which the grant was intended to convey.

An offer of the State to allow parties, ready to serve municipalities with gas or water, provisions for conveying the gas or water, is to be given a practical common-sense construction; and the breadth of the offer is commensurate with the requirements of the undertaking invited.

Where the constitution of the State does not forbid, the State may determine the policy of making direct grants for franchises in municipalities and may determine their terms and scope.

A grant to lay pipes and conduits in the streets of a municipality, dependent only upon acceptance, is not to be regarded as accepted foot by foot as pipes are laid, but in an entirety for all the streets of the municipality; and after acceptance and preparation for compliance with the offer the grant cannot be withdrawn as to the streets in which pipes have not been laid. Such action would impair the contract.

The duty of a public service corporation to extend its service to meet reasonable demands of the community is correlative to the obligation of the municipality to allow the service to be extended as required by the public needs.

In this case the public service corporation having, by accepting the offer of the State and making the investment, committed itself irrevocably to the undertaking, it was entitled to continue to lay pipes

in the streets wherever necessary to extend its service, and it could not be prevented from doing so by subsequent legislation impairing the grant.

The amendment of 1911 to § 19 of art. XI of the California constitution of 1879 as amended in 1884 and municipal ordinances of Los Angeles adopted in pursuance thereof, were ineffectual under the contract clause of the Federal Constitution to deprive a corporation which had accepted the offer of the State, contained in § 19 before the amendment, of its right to continue to lay pipes in the streets of Los Angeles in accordance with the general regulations of the municipality in regard to such work.

163 California, 668, reversed.

THE facts, which involve the construction and constitutionality under the contract clause of the Federal Constitution of provisions of the constitution of California in regard to right of gas and water companies to excavate streets in municipalities for their mains, and the application of such provisions to such corporations in the City of Los Angeles, are stated in the opinion.

Mr. Garret W. McEnerney and *Mr. Oscar A. Trippet*, with whom *Mr. Warren Gregory*, *Mr. H. H. Trowbridge* and *Mr. W. H. Chickering* were on the brief, for plaintiff in error.

Mr. Ray E. Nimmo and *Mr. Albert Lee Stephens*, with whom *Mr. John W. Shenk* and *Mr. William J. Carr* were on the brief, for defendant in error.

By leave of the court, *Mr. Charles S. Wheeler* and *Mr. John F. Bowie* filed a brief as *amici curiæ*.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a writ of error to review a judgment in a *habeas corpus* proceeding. 163 California, 668.

The plaintiff in error was arrested, on or about Febru-

ary 27, 1912, upon the charge of excavating in a street of Los Angeles in violation of a municipal ordinance. He was acting on behalf of the Economic Gas Company, a corporation supplying inhabitants of the city with gas, and was engaged in preparing to lay its pipes in a street which it had not previously used. The company was proceeding under a claim of right based upon § 19 of art. XI of the state constitution of 1879, as amended in 1884, which was as follows:

"SEC. 19. In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants, either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

On October 10, 1911, this section of the constitution was amended by the substitution of the following provision:

"SEC. 19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate

works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; *provided*, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

Thereupon, by ordinance approved October 26, 1911, the city of Los Angeles provided that no one should exercise any franchise or privilege to lay or maintain pipes or conduits in the streets for conveying gas, water, etc., without having obtained a grant from the city in accordance with the city's charter and the procedure prescribed by the ordinance, unless such person (or corporation) might be "entitled to do so by direct and unlimited authority of the constitution of the State of California, or of the constitution or laws of the United States." Another ordinance, approved February 21, 1912, declared that it should be unlawful to make any excavation in a street for any purpose without written permission from the board of public works, and that before issuing the permit the board should require the applicant to show legal authority to use the streets for the purpose specified.

It was under the last-mentioned ordinance that the charge was laid against the plaintiff in error. A writ of *habeas corpus* was sued out upon the ground that the municipal legislation, and the constitutional amendment upon which it rested, so far as they interfered with the extension by the company of its lighting system within the city, impaired the obligation of the company's contract with the State in violation of Art. I, § 10, of the Federal Constitution, and also deprived it of its property

without due process of law, and denied to it the equal protection of the laws, contrary to the Fourteenth Amendment. The writ was returnable before the Supreme Court of the State.

It appeared that the Economic Gaslight Company was organized in 1909 and thereupon undertook to manufacture and distribute gas within the city for lighting purposes. As there were no gas works owned and controlled by the city, the constitutional provision (as it stood before the amendment of 1911) applied. Having acquired an existing plant, which had been established under the authority of that provision, the company had extended its system so that, prior to October 10, 1911, it had many miles of mains and was serving upwards of 3500 customers. Its plant had been established with a view to an increased demand for its service. Its situation, as disclosed by the petition, which was not traversed, was thus described by the state court: The petitioner "shows that the works of said company were established and operated with the intent to supply gas in every section of the city and to lay pipes in every street, if necessary for that purpose, that to this end it constructed works of a size sufficient to supply gas to a much larger territory than it was supplying prior to October 10, 1911, and had expended in so doing $100,000 more than would have been required for works to supply only the territory reached by its pipes at that date, that it had laid and maintained its pipes in many streets of the city and had supplied gas thereby to the inhabitants in such streets for more than two years before said date, that prior to said date, said company had made contracts with many of the inhabitants of the city to supply gas to them, that said contracts were still in force, and that, in order to perform them, it must extend its mains into streets not before used by it. All its works before that date were constructed in accordance with the provisions of the constitution existing

prior to said amendment and in compliance with existing regulations and directions of the city authorities." The petition also sets forth that by reason of the increased expense of construction of its plant, as above stated, it could not supply at a profit the territory contiguous to the streets actually used by it at the date of the amendment, and that to confine its service to that territory would entail upon the company a constant loss of more than $2,000 a month.

It was further averred that on February 23, 1912, the company had applied to the board of public works for permission to excavate in the designated street, not theretofore occupied by it, for the purpose of extending its distributing system in accordance with the former provision of the constitution, offering to comply with the general regulations of the city with respect to damages and indemnity for damages. The board informed the company that there were no general regulations on the subject with which it had not complied, but that the company would not be permitted to open the street, or to lay its pipes therein, unless it first sought and obtained a franchise by purchase in accordance with the ordinance of October 26, 1911. Thereupon, the company notified the board that it would extend its mains at the time and place stated and requested the board to direct and superintend the work. It was proceeding accordingly to open a trench for its mains when it was stopped by the arrest of the plaintiff in error.

The Supreme Court of the State held that the constitutional amendment authorized the city to enact the ordinances in question and thus to prescribe the terms and conditions upon which franchises of the character described might thereafter be obtained and exercised. It was further decided that the grant under the former constitutional provision took effect only upon acceptance; that the only means whereby an effectual manifestation